LINCOLN

The Constitutional Lawyer

By

John Maxcy Zane

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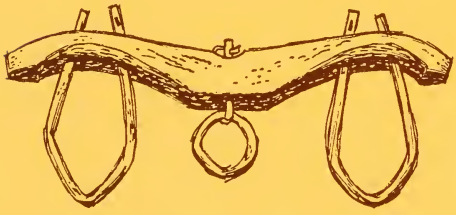

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To Charles Rubens
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with his compliments
by the Author.
Jewell Zane
Chicago January fourteenth
1939.

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BY

JOHN MAXCY ZANE

LL.D., LITT.D.

Printed for

THE CAXTON CLUB, CHICAGO

1932

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I

THE PRACTISING LAWYER

TWO full generations have passed away since President Lincoln was borne amidst the tolling bells to his resting place among your dead. It is now possible to consider him without partiality and with detachment and understanding. A vast literature has grown up around his life, his character, his renown. I shall attempt to portray him purely as a lawyer in order to show his legal mentality. All his political life and acts I shall not touch, except as it may be necessary to judge of his lawyer-like ability and attainments. His attitude upon new and difficult constitutional questions, that he was compelled to meet and solve, will be adequately indicated and relumed by constitutional law as it is now settled. I shall set before you the proof of what he was as a constitutional lawyer by evidence showing, despite commonly accepted ideas, that

[1] An address delivered at Springfield, Illinois, on February 12, 1932, before the Lincoln Centennial Association.

he was a legal genius of the first rank; but first I shall show you what he was in ordinary professional life, indicating the training and qualities which he brought to the Presidency and the basis upon which he as President built his achievement as an interpreter of constitutional law.

At the outset let me say that there has been a mass of writing upon Lincoln merely as a lawyer. No one ought to approach the subject unless he has read all that touches this legal aspect. I am not concerned with other writing upon him. Much of this writing on him as a lawyer can at once be dismissed, after reading, as negligible. The non-professional matter is rarely worth attention.[2] I notice but five authors, although there are many more who have attempted to describe his legal abilities. Mr. Richards' book is valuable, founded upon adequate investigation, but it does not picture Lincoln in his legalistic totality, especially as a constitutional lawyer. Mr. Hill's book is interesting, if nothing more. Nicolay and Hay did not write as lawyers, though they give some legal information.[3] Mr. Beveridge in his unfinished work has gotten together with incredible

[2] Randall's *Constitutional Problems under Lincoln* is such a non-professional work. He has a number of matters of fact that are interesting, but discussions of matters of constitutional law are beyond his capacity. The general result is valueless from a legal standpoint.

[3] Works such as those of Ida Tarbell or Rose Strunsky have no actual value, and state no new facts. Judge Wanamaker has no comprehension of Lincoln as a lawyer. Ludwig is absurd. Masters, in

industry all that has been said by others upon Lincoln as a practitioner, but he relies upon misleading material. Of Beveridge's ambitious work it may not be fair finally to judge in its unfinished state but so far as he had gone, it may be said of his book what was said of another book, "Much of it is so bad, that it ought not to live, and some of it is so good, that it ought not to die."[4] There is a late very valuable paper by Paul M. Angle, the

Lincoln, The Man is too much given to hurling the contumelious stone. His ignorance on matters of ordinary historical knowledge is astonishing. As an instance, he says (p. 25) that Jackson called the alliance of Clay and John Quincy Adams "a combination of the Puritan and the blackleg." Imagine Jackson quoting Fielding, from whom the words come. Every tyro knows that John Randolph applied the quotation and Clay and Randolph fought a duel over the aspersion, Yet Masters is not without value as showing the attitude of the Douglas Democrats in Illinois during the years from 1854 to 1860. He does not seem to be very well read in the historical sources for that period. Lord Charnwood in his book is wholly without understanding as to our constitutional law and seems to have no juristic conceptions whatever. (See notes 24 and 53, *infra*.) Not one of the authors examines Lincoln's constructive constitutional policy and many seem to think that he as President was constantly violating the Constitution, which is a wholly untenable position. It is not necessary to notice the general mass of writing upon Lincoln's political career, for it affords no light on Lincoln as a framer of a constitutional polity. A late book is *Lincoln and his Cabinet* by an author named Macartney. It has no value for the legal aspect of the President. Another late book, by Emanuel Hertz, shows very great insight as to some aspects of Lincoln as a lawyer. But for the legal constitutional aspect of Lincoln a very late book, *The Reward of Patriotism*, is by far the best. It is by Lucy Shelton Stewart, and is buttressed by adequate references and great research. Some of the author's personal opinions are not convincing. The book came out after this address was written. The author has certainly shown some new facts as to Robert E. Lee.

[4] Beveridge does not seem in the slightest degree to understand Lincoln's legal power, but he had not reached very far into Lincoln's ideas as a constitutional lawyer.

Secretary of your Association.[5] He has consulted the legal records of various Illinois counties to show Lincoln's activities on the circuit. Lawyers will be inclined to think that he puts too much dependence upon the wholly adventitious circumstance of whether a case was lost or won, but he supplies much material, judiciously considered, not hitherto available.

In regard to the recollections of Lincoln's contemporaries, it is but just to say that Lincoln was a very reserved man, and necessarily their impressions are not entirely reliable. When a first-class mind is filtered through an inferior one, it becomes unrecognizable. The objection to the statements of such original sources as Herndon,[6] Lamon,[7] Whitney, Swett, even Judge Davis and

[5] *Lincoln Centennial Association Papers*, 1928.

[6] William H. Herndon was in a position to have become Lincoln's Boswell had he had any of Boswell's literary tact and ability to picture his subject without personal refractions. After reading all that Herndon has written, including the suppressed book, I am persuaded that the Lincoln he pictures is mainly Herndon, but almost all the writers borrow heavily from him. Weik did not give much help in his revisions of Herndon. Perhaps I should say that I was related through marriage to Herndon.

[7] Lamon wrote a *Life of Lincoln* and published a volume of *Recollections*. He does not seem to be a naturally truthful man. He may be judged by the fact that, with dullness beyond all comprehension, he pronounced Lincoln's Gettysburg address a failure, and complimented Everett's oration. Milton's *Age of Hate* quotes Lamon as stating a large public sentiment in this connection. If it were so, the public was certainly dense. Everett himself knew better, and bore instant and unhesitating testimony to the power of Lincoln's address, as Nicolay and Hay show. Before Lincoln decided to revictual Fort Sumter, he sent Lamon to South Carolina. Lamon reported the fact that the seceded states were bent on hostilities.

many others, is that they strongly tint Lincoln's mentality with their own. We know that it is not Lincoln who is speaking. Some seem to wish to detract from his career as a lawyer, because they are obsessed with the fantastic conception that Lincoln, without adequate training and wholly unfitted for high office, was suddenly endowed, through direct personal inspiration from God, with super-human capacity in order to make him the savior of his country.[8] There is much that has been said by honest and well-meaning people to support this conception, but it may be dismissed as a fairy tale. Things do not so happen in this world and never have so happened.

> "The heights by great men reached and kept
> Were not attained by sudden flight."

A legal *critique* upon Lincoln must be made by a lawyer experienced in practice from a legal standpoint.[9] It must be based upon his acts and words, weighed with accurate and sure legal perception, and it must be made by one who has read *seriatim,* at the least, every volume of the Supreme Court Reports by Black, by Wallace

[8] This conception greatly disfigures the work of Mr. Hertz. It is essentially a religious conception and can only be indulged by one who can assume the direct personal intervention of an anthropomorphic God in daily affairs.

[9] Those who are not lawyers will naturally object to the above statement, although they must admit that an unprofessional man is not equipped to pass upon legal matters.

and by Otto, which is no small task. Then if he has read all the cases of Lincoln in the Supreme Court Reports of Illinois and knows those Illinois reports thoroughly up to the year 1860, he may be sure that he has made a beginning. Above all, one must follow the first canon of literary criticism and it is to let the man speak for himself and to report him with understanding and lucidity. To that end one must have read, in addition, all that he has said or written on legal subjects at least and all that he is reported to have said or written.

To find him in life as he was at the maturity of his powers as a lawyer, let me take you back to a trial for murder that happened here in Springfield three and seventy years ago. Lincoln's part in it will serve to visualize in familiar surroundings some of his characteristics as a lawyer.

In the village of Pleasant Plains, west of Springfield, two young men had engaged in a quarrel, and afterwards one of them, named Harrison, had given a mortal wound to the other, named Crafton. The clans of Crafton and Harrison were of local importance and the prosecution had been strengthened by private counsel, John M. Palmer, then very well known.[10] The defense was

[10] John M. Palmer was originally a Democrat. In 1847 he was a delegate to the Constitutional Convention as a Democrat; in 1850 he was a Democratic State Senator; in 1854 he became an Independent Democrat; in 1855 he voted in favor of the prohibition law; (It is

in the hands of Lincoln as leader, Judge Logan[11] and Shelby M. Cullom.[12] The trial was held in the first days of September, 1859, in the old Court House that then stood across the street. The jury of twelve good men and true was fairly representative of the County of Sangamon, which, let me say, was not at all the crass and crude community that Beveridge has pictured.[13]

After the prosecution had finished its evidence, the case looked like a wilful murder.[14] For

needless to say that Lincoln refused to advocate or to vote for such a law); in 1856 he was Chairman of the Republican Convention at Bloomington; in 1860 he was a Presidential Elector on the Republican ticket; from 1860 to 1865 he was in the army, early becoming a Major General; from 1869 to 1873 he was Governor of Illinois and had a violent difference with President Grant; in 1872 he became a Liberal Republican; in 1888 he was the Democratic candidate for Governor of Illinois; from 1891 to 1897 he was a Democratic United States Senator; in 1896 he was candidate for President on the Democratic Gold ticket. To me when I was young he seemed a remarkable personality.

[11] Judge Stephen T. Logan was probably the best technical lawyer of his time in Illinois. Lincoln had been his associate in the firm of Lincoln and Logan. He, as an old man, had an eagle-like face and was noted for his readiness in court on any conceivable issue.

[12] Cullom's political career as member of the Legislature, Congressman, Governor and United States Senator for many years, is well known.

[13] I speak with intimate knowledge. I was born in Springfield in 1863 and lived there, except when at college, until I was twenty-one. In 1860 Springfield had a wonderful bar and continued so to have for years. See Graham's *History of the Sangamon County Bar*. I am told that as a small child, I was lifted in my father's arms to see all that remained mortal of the President, but of it I have not even the faintest remembrance. When I was older but still quite young, I listened to the trial of the wretches, who attempted to steal the remains of Lincoln from the monument. My father was the presiding judge at the trial.

[14] In those days the defendant could not be a witness in his own defense. In our day the law has reached the conclusion that in a civil case a party suing or sued cannot be trusted to tell the truth when testifying to something equally within the knowledge of himself and the

the defense, Harrison's grandfather, Peter Cartwright, was called to give evidence of the dying statement of Crafton. An exhaustive legal argument was first made to the Judge by Logan and Lincoln for the defense in order to obtain the admission of the evidence. They prevailed and then followed a dramatic scene,[15] whose effect cannot be caught from the newspaper account.

Peter Cartwright, as doubtless most of you know, was an imposing old man, a great personality and an impressive one. His patriarchal white hair softened his strongly featured face, furrowed by lines of endurance. He had been a noted pioneer preacher, a powerful exhorter, laboring with zeal in his Master's vineyard. Well known to the jury and everywhere looked up to as a good man,

deceased as the represented opposite party; but in a prosecution for the murder of a deceased, the murderer, having killed the opposing evidence, may testify fully. Here is an instance, where, as Shakespeare puts it, "old Father Antic, the Law," is cutting an astonishing caper, or as Mr. Bumble says: "If the law supposes that, the law is a ass, a idiot." It considers property more valuable than life.

[15] Beveridge, 1;550, wonders why it was that such evidence was admissible, but he simply does not understand and was uninformed about the case. An abstract of the testimony exists in the file of the Illinois State Journal of the time. It is in the Illinois Historical Society's library at Springfield and I am indebted to the Library for a photostatic copy. The dying statement was certainly admissible for the prosecution as to the circumstances of the killing. The question was whether it was admissible for the defense and whether the whole statement should come into evidence. Herndon has made a wild statement about Lincoln, during the trial, flaying the judge. It was "terrible, blasting, crushing and withering," according to Herndon. I cannot accept this assertion as the truth. Lincoln never made such mistakes in the trial of a lawsuit. No one but a congenital imbecile would assault a judge who was ruling for him. Those things are simply not done.

truthful, religious, straight-forward and courageous, his words came heavily weighted. He was used to assuming a tone of authority in calling sinners to repentance and some of that authority and his appearance and reputation made him an admirable picture as a witness, even though it depended upon him to save his family from the disgrace of a hanged murderer.

His testimony was introduced by Lincoln with deference and tact. The old man was allowed to tell in his own way the story of his visit to the dying man. He had been asked as God's minister to go to the bedside of Crafton and to hold a religious service at the deathbed to smooth his pathway to eternity. Crafton knew, said the preacher, that he was soon to die. Doubtless the preacher told him of his Christian duty to enter the awful presence of his God at peace with all men, with no hatred, no desire for vengeance in his heart, that he must come as a sinner, pleading solely the grace of salvation. Cartwright prayed earnestly, with all his exhorting fervor, for the conversion and redemption of the sinner and for God's mercy upon the wastrel, who lay there feeling already upon his brow the dew of a heavenly morning, but fearing, as so many must fear, the passage of the narrow door of the dark house of death. The sinner, who had become newly converted, also prayed for forgiveness for his sins and gladly forgave all that

had trespassed against him, as he begged that his own trespasses might be forgiven.

From this the passage was easy to the last and greatest injury that one human being can suffer from another. Crafton fervently told the preacher that he freely forgave his slayer, that he did not blame his assailant, that the fault was his more than Harrison's, and he earnestly said that he had no feeling against Harrison. How much of this was Cartwright and how much Crafton, who can say? But as told to the jury, it was all Crafton, and Lincoln's almost uncanny knowledge of the human soul told him that in his hands, with his art of appeal to the consciences of men, especially of those who had a living faith in the cleansing by faith and repentance of a converted soul, the evidence would be decisive.

After this touching narrative came the speeches to the jury at a night session. Lincoln, the next morning, closed for the defense, and men when I was young could still tell of the wonderful, moving power and pathos of that appeal to the jury. To him the one important thing was the dying man's forgiveness and earnest statement that he was at fault. It is true that, in the cold legal logic of our day, it makes not the slightest difference whether the murdered man forgave his murderer or not. The nature of the act of killing, the public offense, was not changed or mitigated, yet there

was a time in human history, when the law knew no such conception as a public offense. A homicide was only a private wrong to the injured man and his family and that primitive notion is like many other archaic ideas which "still rule our spirits from their urns." So it happens that to almost all normal men, out of the instinctive subconscious mind, comes the feeling that the dying man's forgiveness erases the moral guilt of the slayer. This feeling is a living inheritance from prehistoric days, when the slain man could in his little remaining life forgive the injury and decide whether the killer should be pursued or freed. This was the Greek law and the so-called Divine Law over two thousand years ago.[16] It became consecrated in the views of the Church. Even today the normal, untutored man, trained in the thought out of an immemorial past, has the instinctive conviction that the dead man's last wish must be respected, whatever the public or even the man's family may desire.

Lincoln, in his speech, brought forward the dying scene, he made it live before the jury, and all his listeners were moved to tears, as he described

[16] This was the reason given for pardoning Francois Villon for a homicide in 1455. Villon was that great and fascinating French poet who led such an *oragious* life and died no one knows how or where. The latest *Life of Villon* in English gives enough particulars. The works upon him in French are, of course, numerous. Swinburne's "Ballad" is well known with its line:

"Villon, our sad bad glad mad brother's name." (*sic*)

the repentant sinner on his deathbed, stretching out his hands with hope of a farther shore, seeking to right his life with his salvation and imploring that he should have no part in bringing even his slayer to the scaffold. Lincoln persuasively put to the jury, that he who best knew the circumstances had said that his adversary was not to blame, mixed with the controlling thought, subtly suggested, that the jury should not wrench from the dead man his best claim to Divine mercy.

Lincoln was not misled. The jury, after a decent interval, acquitted the defendant. One must consider how this defense might have failed in the hands of most capable lawyers in order to judge of Lincoln's skill and insight. Some lawyers would have dismissed the evidence as of no value. Others would not have known how to get it before the jury in its arresting and moving quality. Most of them could not have used it as Lincoln did. The case shows Lincoln as a forensic genius, making legal reasoning ministrant to those subtle touches of deep emotion that move the inmost soul.

It recalls another trial where against an honest debt two young men, although they confessed the transaction and had received full value, had pleaded the harsh legal defense that they were not liable because they were not of full age when they

contracted the debt. Lincoln, for the plaintiff, having put in enough evidence to go to the jury, appealed so powerfully to the twelve men not to let these young men disgrace themselves for life by gaining such a dishonest, technical avoidance, that he convinced not only the jury, but the young defendants themselves, that they had been badly advised.

In his practice Lincoln tried the great Rock Island Bridge case as leader. Here was fought that first and greatest struggle between the water interests and the railroads which determined the fate of Chicago as the great distributing center of commerce against St. Louis. Important cases regarding the charter of the Illinois Central Railroad were won by him. He was for years the standing counsel of the Railroad Company. There were certain leading cases where he established the law. He represented many moneyed men in litigation, some of them well-known bankers. In one case he made a stubborn, pertinacious effort to support an old man's will against his family, where the old man seemed to have been lost to ordinary natural affection. His notes of argument show his careful method.

The strangest case of all is where he appeared for a slaveholder seeking to force back into slavery his former slave, whom he had brought to Illinois, a free State, and thereby, it was claimed,

had made him free. The case was heartrending, tearing an old colored man away from his wife and children. Lincoln was offered a fee on behalf of the slaves, but he was engaged upon the other side. He maintained the legal proposition that it was all a question of the slaveholder's intention. If he brought his slave into Illinois, not intending to establish a residence of longer or shorter duration, he did not thereby confer freedom upon the slave. This was, no doubt, the exact law at that time upon that perplexing question.[17]

Here, once for all, let me refer to absurd stories told about Lincoln as a lawyer, that he would desert a case in the midst of it on account of not being satisfied with his client's moral uprightness, that he would not argue cases unless thoroughly satisfied with the moral attitude of his client, and many other stories of that nature. A trained lawyer knows their untruth, however the credulous

[17] The law then admitted that an owner of property temporarily sojourning in or passing through a State was protected against a confiscation of his property. The real legal basis of such rulings must have been the clause giving the citizens of each State the privileges and immunities of citizens in the several states, although a State might deny to its own citizens the right to hold property in slaves. This proposition afterwards supported Lincoln's criticism of the tendency of the Dred Scott opinion. In *Crandall v. Nevada*, 6 Wallace 35, the Supreme Court of the United States afterwards decided that each citizen was entitled to travel and to go across State lines without impediment and to carry his property with him. See the note 44 *infra*. The Fourteenth Amendment now denies to a State the power to abridge the rights of citizens of the United States.

multitude may devour them. Lincoln could not have held a large practice on circuit, which came to him from other lawyers, if he had indulged in such unprofessional conduct. He acted on the principle, without which a civilized system of law or a legal profession cannot exist, without which equality before the law cannot endure, that every litigant is entitled to have his case presented fairly upon the facts and as strongly as possible in its legal aspects. But Lincoln acted consistently upon the words which I am about to quote, although they were spoken four years after his death: "The arms which an advocate wields he ought to use as a warrior, not as an assassin. He ought to uphold the interest of his clients *per fas,* not *per nefas* (by right, not by wrong). He ought to know how to reconcile the interests of his client with the eternal interests of truth and justice."[18] Lincoln, like every other good lawyer, always advised his client for the client's best interests, and never, like some sodden creatures, advised litigation because he desired the fees accruing from litigation.

We may be certain that a present-day leading practitioner in Illinois would be exceedingly fortunate if he had Lincoln's practice or his then apparent reputation. Before he was elected

[18] Lord Chief Justice Cockburn at the dinner given to the French Advocate Berryer in the year 1869 in London.

President he had, of all Illinois lawyers, the best claim to be considered the head of the Illinois bar.[19] To the lawyers with whom Lincoln practiced, and they were, many of them, of great

[19] Almost the last case that Lincoln appeared in was the famous so-called "Sandbar Case" at Chicago. Beveridge, 1;597, is astray on this case. The case singularly enough did not involve the "Sandbar" at all, and Whitney, whom Beveridge relies on, misled Beveridge by his accustomed inaccuracy. The facts are not in doubt. Prior to 1833 the Chicago River through what is the old part of Chicago, then ran from the west toward the east and just before entering Lake Michigan turned to the south, and had formed, between the River and the Lake from the turn to the south to the point where the River entered the Lake, the "Sandbar." But in 1833 the U. S. Government made, from the turn to the south, straight out into the Lake, a channel between two piers called the North and the South Piers, which still exist. This change left "the Sandbar" south of the new channel. Thereupon the waters of the Lake washed in sand along the north side of the North Pier making very valuable land, out of what had theretofore been the Lake. The case, *Johnston v. Jones and Marsh*, was concerned with the land formed alongside the North Pier by the sand washed in by the waters of the Lake, as the Lake shore on the north side of the new channel had receded, and the question was as to ownership of this newly formed land, north of the new channel. The full evidence on the first trial exists in the Chicago Historical Society's library, a reference for which I am indebted to Logan Hay, Esq. of Springfield. The case was first tried in 1855 and for a misdirection of the Court was reversed by the Supreme Court on January 22, 1856, in *Jones v. Johnston*, 18 Howard 150, which Beveridge did not discover. The case was remanded for a new trial and was tried a second time and the jury disagreed. The third trial was had in 1860. Lincoln's reputation was now so great that he was called in by one of the parties in order to make sure of winning the case. He was one of the counsel for the defendants. They won upon this trial, and Lincoln was the prevailing factor. Beveridge says that Lincoln appeared in the interest of the Illinois Central, but he is mistaken. The land in dispute is now occupied by the Chicago and Northwestern switch yard north of the Chicago River and the long line of buildings on the north side of the River, standing on the North Pier. The Illinois Central never extended across the River to the north of the River, and Beveridge is completely mistaken. The Chicago and Northwestern, or rather its predecessor, had the land. The only correct statements of Beveridge are as to the names of the parties to the action and the names of the attorneys upon the last trial.

ability, he seemed, wherever he was, trying a jury case, arguing to a court on legal points, or in the difficult presentation of legal propositions on appeal, a versatile lawyer, one of extraordinary resource and legal acumen.

Lincoln was exceedingly popular among lawyers. He was large minded, helpful and generous to other lawyers, and had none of those petty jealousies that sometimes exist at the bar. He thought no evil of others and spoke none. It is a sad fact, considering what a noble calling the law can be made, to think that the outward show of good feeling among members of the bar, of which they make so much pretense, is too often a mere sham. One of the saddest cases of that kind happened to Lincoln himself. Not only was he shouldered out of a case by Edwin M. Stanton, with the aid of a patent lawyer, Harding, but even the presiding judge, McLean, gave a dinner to the lawyers engaged and Lincoln was not even invited. That set of diners missed a chance to hear some brilliant conversation that would have redeemed the egotistical dullness of the stodgy McLean. But the best commentary on the occurrence is that it illustrates Lincoln's largeness of mind and his lack of rancor. He made Stanton his Secretary of War, and let us hope that Stanton with his great qualities, crusted over with many meannesses, came to comprehend at last

what a cruel, shabby and ignoble creature he had been.[20]

Lincoln was in actual practice, a skillful, hard-working, successful lawyer, and this arose from the constitution of his mind. He had that legal cast of mind without which no practitioner can be considered at all capable. This gift is innate. One does not get it by study, by reading, by cultivation. Those things may be aids and great advantages to a legal mind, but they cannot take the place of natural endowment. The legal cast of mind, like all natural and obvious things, is difficult of definition. But roughly we may approximate a definition by saying that it causes a man, when a set of facts with a legal aspect is put before him, to turn naturally to a classification of those facts with reference to fundamental legal rules. It includes an ability to discriminate, to make distinctions, to analyze the facts into their essential elements, to call up analogous rules of law, and to follow, by a line of logical reasoning, the facts to an ultimate reasoned legal

[20] There are different accounts of this matter and they agree in the main points but not in details. They were given years after the occurrence and as to details are necessarily unreliable. Nicolay and Hay give the statements of Harding and another. Beveridge, 1;570, follows Parkinson as to what he had been told in conversation. The main facts are reasonably plain and are correctly stated by Nicolay and Hay. On Harding's own statement, as reported by Parkinson, whom I knew as a most garrulous person, neither Stanton nor Harding made the least approach to being a gentleman in the practice.

conclusion.[21] It requires a power of prolonged reflection and this Lincoln had. He could sit for hours without a movement, working out a line of thought to its satisfactory end; and stupid people considered it indolence.[22]

It follows, of course, that there must be some preliminary acquaintance with rules of law as a system, but that is not sufficient without the endowment of nature. One knows that a large part of the lawyers who are engaged in practice have not at all the legal cast of mind. Such non-legal men in our country (but not in England) are often very successful in practice, if we regard merely the making of money or even prominence. Lincoln in his practice on the circuit approached very nearly to the English barrister. After he reached years of maturity he was, in every case where he acted, by common consent of those with him, selected to act as leader.

In Lincoln's practice the judge on circuit would come to the county seat to hold a term of court.

[21] Many judges have not this legal cast of mind, and the opinions of such judges published in the reports and full of hasty and undigested statements make so much of this legal literature a positive detriment in the law. To the laity this legal cast of mind is not, generally speaking, at all attractive.

[22] One foolish man tells about Lincoln arising from bed in the night and sitting muttering to himself for a long time. This lawyer was certain that Lincoln was losing his mind. Translated into terms of common sense, this tale means that Lincoln had a case that he was pondering. He could not sleep, was going over the case in his mind and was oblivious of the bovine person who was watching him.

With him would come the lawyers traveling the circuit. A lawyer like Lincoln would find at each county seat perhaps twenty or more cases, made ready by local lawyers, that he was expected to try in the course of the short term. All he could do was to hold a consultation with the local lawyer who had selected him, find out the circumstances of the case, and learn from the local lawyer the cases applicable to show the law. This sort of practice requires great readiness and legal agility.[23] The very fact that Lincoln had a large practice on circuit is absolute proof that lawyers considered him learned and able. His many cases in the Supreme Court were given him by lawyers, who knew his talent for presentation.

The county seats were country towns, it is true, and the lawyers could be called country lawyers,[24] as some have said, but after a long experience with both "city lawyers," so called, and "country lawyers," so called, I know that legal ability does not depend upon locality, college training, clothes, residence in a large city, or the

[23] Mr. Angle in the paper above referred to states his conclusion that Lincoln in the work on the circuit was neither ready nor more than ordinarily successful in winning cases, but that it was when Lincoln had time for reflection that he was a very strong lawyer.

[24] This is a very common term applied to Lincoln in many non-legal works. An Englishman who wrote a life of Lord John Russell uses the phrase "country lawyer," as to Lincoln. England, comparatively speaking, is a small place. The whole bar is concentrated in London around the law courts; and most of the important attorneys even are

impudence, boastfulness and triple brass of some quite successful "city lawyers." In Lincoln's time even Washington, the capital of the country, was in many ways but a mud hole. Chicago in one aspect could be called a "country town," yet Chicago had a wonderful collection of men. Such as it was, he was asked to come there and practice, but declined. It is only a very ignorant man who flippantly talks of "country lawyers." No doubt when Lincoln began practice he was inexperienced, but people are apt to forget that a young lawyer can learn only by experience. He is like a player upon the violin, who is learning the instrument while playing in public.

Hitherto I have spoken of Lincoln mainly as an advocate. Generally speaking, the best advocates are those, of course, who not only are blessed with the power of interesting and convincing speech, and address and skill in the courts, but are strong also in office consultations, in advising upon statutes, in forecasting a course of legal action, and in formulating and construing legal documents.

there. In England "country lawyer" would necessarily import the inferiority of, not a barrister, but an attorney living out of London. This author did not know the condition in America. Hence comes his abysmal ignorance. Lord Charnwood speaks of Lincoln as a "backwoods lawyer," but he should have read some volumes of the Illinois Supreme Court Reports before he ventured an opinion. If he had he would have been informed that cases were argued by Lincoln on exactly the same rules and in the same manner as they were argued in the courts at Westminster and he had access to a legal library as exhaustive as that used by any London barrister or counsel.

Such a man is what is called the "all around" practitioner.[25] It was Lincoln's good fortune that he belonged among such men. They are not numerous at any bar.

I cannot say that Lincoln was a deeply read lawyer when he began practice, or that he ever had the wide theoretical knowledge of law that makes the jurist. Many lawyers have not that knowledge, even though they have been years in the practice and have had full opportunity to acquire it. But an expert, who knew intimately many able men, had asserted that far more men have attained glory and virtue by natural ability without learning, than by learning without

[25] Channing in his *History* speaks of Lincoln as only, what he is pleased to term, "a jury lawyer," whatever that term may mean. A jury lawyer, *i.e.* one who tries cases at law, in order to do so to the best advantage must be a good general lawyer and much more. But uninformed people think of a lawyer called a jury lawyer as a sort of verbose person whom Lincoln accurately described as one who stands up, strikes an attitude, glazes his eyes, opens his mouth and leaves the rest to God. In our courts today the mass of litigation is conducted by lawyers, many of whom are presumptuous in thinking themselves capable of managing a case in court. Another layman speaks of Lincoln as a "case lawyer." But one who has read Lincoln's cases (those he lost as well as those he won, as to which Richards gives full information, as to the Supreme Court of Illinois, and Angle as to cases on the circuit) will be inclined to say that Lincoln was at his best arguing legal questions before a court of appeal and that he argued from principle and was not what lawyers term a "case lawyer" at all. It was not an era of printed briefs and if there were any briefs of Lincoln, the disreputable Vandals have stolen them from the files and records of the court. In a late book, *The Prairie President*, by Raymond Warren, there are imaginary conversations of Lincoln's which indicate the ideas of Lincoln as a lawyer. But much dramatic genius is necessary to make such inventions convincing, and I fear that Mr. Warren is not a dramatist.

natural ability.[26] Lincoln had the naturally devouring mind which gets to the principle of a decided case and can use the principle. As old Coke would have said, Lincoln had *"praepropera praxis, praepostera lectio"* (too early practice, too late reading). But he had as much reading in the law as Chief Justice Marshall, and Marshall became the head of the Virginia bar. Even Alexander Hamilton, who remains our legal "Colossus,"[27] read law for less time than Lincoln.[28] Many of Lincoln's utterances in literary quality are equal to Webster's, and in point of calm, sure, unerring judgment and of sober, moral intensity, he was far superior to Webster. As a manager of men Lincoln was, of course, without a peer—a field in which both Hamilton and Webster were conspicuous failures. This was Jefferson's chosen field but he was not as adroit as Lincoln.

[26] This is a translation of Cicero, Pro Archia: "*etiam illud adjungo, saepius ad laudem et virtutem naturam sine doctrina quam sine natura valuisse doctrinam.*" Cicero had all the culture of his time, and was the greatest advocate who has ever lived.

[27] It was Jefferson who applied the term "Colossus" to Hamilton.

[28] Hamilton read law but for six months, and Marshall for a not much longer period. Of Hamilton's work on the Constitution the Federalist is the great repository. His formulas he used in setting the government on a successful basis. His doctrines furnished the basis for Marshall's decisions. For statesmanlike outlook his best work was *Washington's Farewell Address*, which he practically wrote.

II

THE STYLIST

AT THIS point I must touch upon Lincoln as a stylist; for it was a part of his legal equipment. Many have wondered how Lincoln could have achieved a prose style, that in melody, clearness, good taste, and directness recalls the great Athenians with their perfect restraint and sense of proportion, where language becomes the perfectly ranged order of expression. As you know, Lincoln attempted poetry, when young, with disastrous results. Even Cicero, probably the greatest prose stylist in the world's history, wrote an epic poem, which by common consent was pitiable. There is a prose style and a poetical style, and while essentially different, they have in common one attribute. It is rhythm, but the poetical rhythm is regular and the prose rhythm is irregular, though much rhythmical prose is called poetry, yet the border between prose and poetry is indefinable for it depends upon other matters than rhythm alone. Lincoln had, in marvelously developed form, the sense for prose rhythm. Pericles' speech over the dead, as reported in Thucydides, Hyperides over Leosthenes and the patriot dead in a later Athenian

war, Cicero's eulogy of the jurisconsult Sulpicius, Bossuet on the dead Princess of Bourbon, and, in our country, Webster on Judge Story, are far outranked in literary touch by Lincoln's short Gettysburg address.[29]

Can a man of refined taste ever forget Lincoln's letter to the mother whose sons had fallen for their country? Never has the poet's *Dulce et decorum est pro patria mori*[30] been more nobly pictured.[31] This is one of the world's treasures of great literature, and it was written without revision. Yet there is nothing mysterious about Lincoln's literary excellence. The people who are astonished do not analyze. A fine prose style requires clear ideas thoroughly thought out, a competence to put such ideas into rhythmical and appropriate words, and the power of using arresting, elevated and at times vividly metaphorical expression. If the command of melodious, varying, rhythmical movement is wanting, a clear and direct style joined with brilliant and metaphorical expression is but mediocre. All the great qualities of a stylist are primarily those of

[29] Lincoln added the taste for beauty in words to the desire for truth. In spite of Keats' dictum that beauty is truth, the reverse is not generally true. A very excellent book is Saintsbury's *History of English Prose Rhythm.*

[30] "Sweet and noble is death for our country."—Horace.

[31] In the World War Emperor William essayed a letter to a mother, whose sons had been killed in the war. After some banal remarks on her great loss, he closed by sending her his autographed photograph! It was more than sympathy; he considered it full compensation.

natural endowment. They are not gotten out of books. As Fénelon says: "A man's style is as much a part of him as his face, his figure or the beat of his pulse—in short as any part of his being that is least subjected to the action of the will." All great prose stylists are just as mysterious as Lincoln, if their antecedents are sought.[32]

What constantly misleads people who wonder at the ineffable grace of Lincoln's diction is that they do not realize that for a critic to appreciate and properly judge a great prose writer's excellence, requires wide reading and cultivation, as a basis of comparison, but the critic's

[32] If it be asked whether Lincoln was an orator, one must ask what is meant by the term. The definition of the orator of Quintilian in his *Institutes of Oratory*, the best work on the subject, is, "*bonus vir dicendo peritus*" (a good man skilled in speaking). Cicero's definition in one of his works on Oratory is, a man who can treat great things with weightiness (*graviter*), humble themes with suggestiveness (*subtiliter*), and mediocre things with restraint and proportion (*temperate*). Lincoln would answer to both of these definitions.

It is remarkable that Lincoln's public utterances, as President, are so uniformly elevated and restrained. His inaugurals are superb. They are a great contrast when compared with those of Jefferson Davis, as are also his proclamations. On October 13, 1863, Davis proclaimed to Bragg's army a fustian address, bristling with "ruthless invader," "outrages without parallel in the warfare of civilized nations," "despotic usurpation," "firing the manly breast," "exalting the hero," and, "to zeal you have added gallantry; to gallantry, energy; to energy, fortitude." Seitz, *Braxton Bragg* (p. 383). Davis was only surpassed by Bragg himself, who tried to imitate Napoleon in addresses to his troops and proclamations to the countryside as they appear in Seitz.

The requests of Lincoln for Thanksgivings and Fast Days are unsurpassed. They have indeed "an immaculate charm, which cannot be defaced." His inaugurals and public proclamations are beyond cavil or carping. Criticism has been made of Lincoln's fondness for the poem which begins, "Oh, why should the spirit of mortal be proud,"

equipment is essentially different from the creative power that is being criticized. Rarely can a critic write as well as the person whom he is criticizing.

Many years ago, when a youth at college, I listened in ecstasy to a lecture delivered by Matthew Arnold, the greatest master of English prose during my lifetime. He was an awkward looking man, tall, bony, angular, and certainly no handsomer than Lincoln. Arnold began his lecture with a sentence that has always lingered in my memory Its cadence is perfect. "Forty years ago when I was an undergraduate at Oxford, voices were in the air there that haunt my memory still." For days I tried to recall where I had read

but the criticasters do not seem to know that this poem is in the anapaestic meter, which is the most beautiful in our language. Its melody pleased Lincoln's ear. It proves his sense for rhythm. It may be that the sentiment of the poem is too obvious melancholy, but the meter is lovely. In Gay's *Beggar's Opera* it is used with comic effect. Byron's "Stanzas to Augusta" are a noble example of this meter.

"In the desert a fountain is springing,
In the wide waste there still is a tree
And a bird in the solitude singing,
Which speaks to my spirit of thee."

Swinburne has in the measure some of his finest poems. A well-known specimen is Longfellow's "Sandalphon," which begins:

"Have you read in the Talmud of old,
In the legends the rabbins have told
Of the limitless realms of the air."

Certainly Longfellow knew the technique of his art. We may be certain that in his reading of Byron, Lincoln knew those Stanzas which are one of the finest products of Byron's great metrical power. Nicolay and Hay prove Lincoln's intimate knowledge of Byron's poems.

something like it, not in thought but in beauty, and at last came back to me the opening words of Lincoln's Gettysburg address: "Four score and seven years ago our fathers brought forth on this continent a new nation conceived in liberty."

III

LEGAL IDEAS UPON SLAVERY

I SHALL now discuss Lincoln as a constitutional lawyer. He, with his characteristic and habitual modesty, would never have called himself a constitutional lawyer, although he has as great claim upon the name as any lawyer in our country's story. This I shall now prove beyond question to anyone who knows something of law.

I shall begin with his fundamental idea upon human slavery. His deep feeling against slavery was a part of his *legal* thinking. He buttressed himself on the Declaration of Independence that all men are created equal. Thus he put himself in line with the best legal thought of past ages. To Aristotle and Plato and the antecedent schools of philosophy, slavery was natural. But the Stoics before the Christian era had evolved the idea of equality before the law as lying at the basis of all theoretical justice according to law. The *Roman Digest,* the greatest law book of the world, had laid it down as a rule of natural and necessary law: "By nature all men are equal."[33] "By nature all men are born

[33] *Digest,* 1, 17, 32.

free."[34] St. Gregory the Great and Ambrosiaster had made the Canon Law of the Church read: "By nature all men are equal," and "God did not make slaves and free men, but all of us are born free."

So the great cultural thought passed down through the centuries of battle and storm, cutting its way from country to country, from age to age. The *legal* doctrine has always been: "By natural law all men are equals."[35] This *legal* doctrine abolished serfdom in England and France, and at the time of our Revolution it was the undoubted common law that a slaveholder who brought his slave into England made him free. The maxim of the Roman law meant "all men," black as well as white. Millions of Roman citizens in the days of Ulpian were black in color. Practically all the fathers of our Republic in the South and in the North knew this age-old truth and understood it in the legal sense and regarded slavery as a great moral and political incubus and curse and hoped for its erasure from the book of positive law. Thus the maxim came into our Declaration as one of the commonplaces of legal thought, yet most Americans think that Jefferson invented the phrase.

[34] *Digest*, 1, 4.

[35] *Quod jus naturale attinet, omnes homines aequales*—Law Maxim.

This is not to say that Lincoln desired for the colored man what can be called social and political equality. He meant what the Romans meant. As an ancient writer on law expressed it: "If the fortunes of all cannot be equal, if the mental capacities of all cannot be the same, at least the rights before the law of all those, who are subject to the same state, ought to be equal."[36] This is what Lincoln said that he meant; not that the colored man should vote, not that he should have social intimacies or propinquities with whites,[37] but in the right to work for whom he pleased, to contract to earn his own bread, to obtain his own property and enjoy it, the negro, Lincoln asserted, was the equal of any man. He based himself on the fundamental *legalities* of a life of freedom, liberty to work, and the right to acquire and possess property. When he did this he spoke as a lawyer. He naturally put himself in line with the juristic thought of the past and the progress of civilization, because he had thought it out that without these fundamentals, justice does not exist. In this he agreed with the juristic basis of all justice according to law. It makes not the slightest difference how he came to know that basis. Let us

[36] Cicero, *De Republica*, 1, 32, 12.

[37] Such matters of relations among people are matters of mere social adjustment or social custom. To any man of common sense and refinement, the ordinary proletarian, whether black or white, is equally offensive, but that is no reason for denying to him either legal or political rights.

never forget that as a lawyer and as a jurist, he was right.

After the passage of the Kansas-Nebraska bill in 1854, civil war had followed in Kansas, but in three years the anti-slavery people were successful and had in Kansas a large majority opposed to slavery. The next move of the South after the failure in Kansas was to urge that slaves were property, fully protected under the Constitution, and that Congress had no power to exclude slavery from the Territories. But the exclusion of slavery from the Territories was *then* of no importance, for the Territories were filled with anti-slavery men, who would form States that would exclude slavery. The crux of the situation for the South was to prevent a State from freeing slaves brought into the State and thus destroying a slaveholder's property.

Lincoln for years had been devoting himself with assiduity to the practice of law, slowly surveying the new political field, and had joined the new Republican party. In this situation came the Dred Scott decision delivered by Chief Justice Taney on March 7, 1857, which roused Lincoln as by the blast of a trumpet. Lincoln's insight had condensed his thought on legal and political development into the words: "In giving freedom to the slave, we assure freedom to the free." It was in its lack of all historical sense that the

Dred Scott opinion was such a glaring reversion to outgrown institutions. Volumes have been written upon this case, many of them by men who knew not enough to either defend or condemn the opinion. The numerous fallacies in Taney's opinion, voicing the views of the majority of the court, are easily demonstrable.[38] I

[38] Taney wrote the opinion for the court. McLean, dissenting, is ponderous and dull. Curtis, dissenting, is very fine. The curiosity is Daniels' opinion, with his *excursus* upon Roman law, which to anyone who is informed, is nonsense. Taney added many pages to his opinion (already too long) as soon as he saw Curtis's opinion. A bitter controversy by letters followed when Curtis tried to get a copy of Taney's opinion. The controversy illustrates Taney's peculiar type of mind. This appears from Steiner's *Life of Taney*, the only work about the Chief Justice that is worth reading. Tyler's life is of no value. Rhodes, McMaster and Channing in their Histories are of no help. Tyler in his *Life of Taney*, Mikell in *Great American Lawyers*, defend the opinion. E. W. R. Ewing wrote a volume on the decision. Magazine articles discussed it. Taney himself wrote a defense, which is in *Mass. Hist. Soc. Proceedings*, 1871–1873, p. 445. Tyler has Taney's supplement to his opinion. Beveridge on the case is not illuminating, but Beveridge on legal matters is necessarily unilluminating. The best discussion, outside those in magazines, is by Steiner, *Life of Taney*, p. 326. He gives full references. He first proved the fact that Taney knew that free negroes owning property once voted in Maryland, Taney's own state, and necessarily they were then citizens of Maryland. Corwin, in his *Doctrine of Judicial Review*, examines the Dred Scott case from his standpoint. I cannot say that it is of any value to lawyers. I very much doubt whether Masters, who wrote *Lincoln, the Man*, has ever read the opinions in detail. Judge Curtis' eulogy on Taney has been referred to, because when Taney died Judge Curtis gallantly came to his defense, and delivered a eulogy that would have fitted Marshall. But lawyers know just how much such eulogies are worth. As to resolutions of the bar or speeches in memorial proceedings, one might as well believe "an epitaph or anything else that's false," or, let us say, McClellan's *Own Story*, a work of unscrupulous fiction, or McClure's two books on Lincoln, or Flower's *Life of Stanton*, or Lamon's *Life* or *Recollections of Lincoln*. The diaries of the time must be used with caution, especially a diary like that of Welles, which shows changes predicated on later happenings.

am not here concerned with the merits of that opinion,[39] but I point out a few matters in the notes subjoined.

Three of Lincoln's positions require notice with reference to the Dred Scott case. He first charged in his famous metaphor of a framed building the decision to be the result of a conspiracy between Stephen (Douglas), Franklin (Pierce), Roger (Taney), and James (Buchanan) to legalize slavery in the Territories. Lincoln, of course, did not charge a criminal but a political conspiracy or intrigue. The charge is now proved by documents. Pierce wrote the clause in Douglas'

[39] The worst thing about Taney's opinion is that in the crucial statement in his opinion, the proposition on which he bases it, he knew that he was stating as an undoubted fact what was not true. He was not sincere in his statement that historically at the time of the adoption of the Constitution no negro had any rights that a white man was bound to respect and that no born slave, as he asserted that he meant, could ever become a citizen of a State in the sense of the Federal Constitution. As to the first point, Taney knew that in the State of Maryland, negroes were voters, if they owned property. A new constitution changed this rule to a suffrage by all free whites and Taney, then a Federalist lawyer, violently opposed the change. The change did not make the negroes, theretofore citizens, into non-citizens. Hence historically Taney knew that he was untruthful. As to the other point, he was counsel in *LeGrand v. Darnall*, 2 Peters 664, a case brought to settle a title to real estate. Darnall, born a slave, sued as a citizen of Pennsylvania against LeGrand, a citizen of Maryland. Taney tried in his opinion to dodge this case, but he did not succeed. If Darnall was not such a citizen, the fact appeared on the record, yet Taney accepted the decree for his client, thereby certifying the judgment to be good and necessarily that Darnall was a citizen of Pennsylvania. Both of these points Justice Curtis missed in his opinion. It must be remembered on behalf of Taney that he began life as a Hamiltonian Federalist and he never was able to distort his legal mentality into that of a States-Rights Democrat. Steiner in his *Life of Taney* has shown this fact beyond any reasonable doubt.

Kansas-Nebraska bill repealing the Missouri Compromise. Pierce's message in December, 1856, told of the coming decision. Letters of Justice Catron, of President-elect Buchanan, of Justice Grier, and the letters of such men as Alexander H. Stephens and the Inaugural Message of Buchanan March 4, 1857, followed in three days by the Dred Scott decision, *prove that the political intrigue was an actual fact.* What cannot be presented openly and in the face of day to a court, it is disgraceful to present privately to the court. What a judge cannot state in his opinion as a ground for his opinion, it is shameless to allow himself to be influenced by. In point of judicial morals there is no difference between money offered as an inducement and political influence. This case is the one indelible stain on our highest court that for years dimmed the purity and the glory of a mighty tribunal. If today a President, a President-elect, Congressmen and Justices of the Supreme Court should in concert by concealed, privately suggested intrigue, prejudice a civil private litigation, where the rights of any human being should be made a judicial football, the country would be rocked to its foundations and every judge who took part in it would be left wholly without character. Lincoln, as a lawyer, made the charge of a political intrigue. He was justified by then existing

incontrovertible documents, even though only partly known to him.[40]

Today the political intrigue is a historical fact, but the act is sought to be excused by goodness of intention on the part of the judges and the politicians who engaged in it.

His next proposition was that the decision, while it settled the fate of that one betrayed and helpless negro, was wrong in legal principle, deplorable in its political tendency,[41] an atrocity in

[40] Some of the documents are in Warren's *History of the Supreme Court*, but Warren does not seem to understand what that evidence indicates. The Supreme Court has never appealed to any part of the Dred Scott opinion as an authority, but has always

> "Walked backward with averted eyes
> To hide the shame."

Taney's proposition that the power of Congress over the Territories was not complete has been overruled a hundred times. The Constitution does not extend over the unorganized territory of the United States. Taney asserted the contrary in his Dred Scott opinion. Congress in legislating for unorganized territory is not bound by any of the limitations of the Constitution. *Public Utility Commissioners v. Ynchausti*, 251 U. S. 401. Practically every Act of Congress organizing a Territory extended the Constitution or parts of it over the Territory organized.

[41] Lincoln always spoke with courtesy of Taney. No doubt the Chief Justice had the best of intentions in his ruling in the Dred Scott case. The rest of the concurring judges were actuated by praiseworthy motives, although Catron said that it was asking too much of him to hold that Congress had not full power over the Territories; so he was compelled to put his opinion on palpably foolish grounds. He showed in his opinion that he was being dragooned. It is not necessary to speak harshly of Taney, yet Steiner in his *Life of Taney* shows that at the opening of the Civil War Taney congratulated a young relative on the fact of his enlistment in the Confederate Army and that he was going South to fight for freedom. This is strange language to come from the Chief Justice of the United States, who did not think it proper to resign. Wayne of Georgia and Grier of Pennsylvania appear in a much better light. It is not commonly known that practically all of Taney's fortune was in Virginia state bonds or, as it was called, stock. The

morals, and as such ought not to be considered the law. Lincoln insisted that a decided case, while it settled the rights of the parties thereto in accordance with what the judges in their often

State of Virginia tried to pay Taney interest on his bonds during the war. But he saw the evident impropriety, if not the treasonable conduct of taking it. But it must always be remembered, in Swinburne's phrase, that *nil nisi bonum* is often "the liar's maxim and the traitor's plea, which forbids us to speak truth, when to speak truth is to speak evil of the defeated, the dishonored, and the dead." It must be apparent to the legal scholar that Taney's lack of historical sense appears when he asserted that the phrase of equality in the Declaration copied out of the *Roman Digest*, understood for ages and by every lawyer at the Revolution as a statement of natural law (*jus naturale*) to cover all men of whatever color, did not include the colored man because they were slaves, or even if free were the descendants of slaves. But all slaves had not been colored men. In 1664, English from New York captured a settlement, New Amstel (now Newcastle) on the Delaware and sold the Dutch garrison into slavery in Virginia! Doyle, the Middle Colonies, p. 134. The white women, who were brought over to Virginia, put on the auction block and sold to the highest bidder, were certainly not free, yet some of the so-called First Families of Virginia were descended from those serfs. A Rajput prince would be classed as a colored man, yet he is a pure Aryan, probably a purer Aryan than any of the European or American whites, and he would scorn to sit at the table with Taney. Erasmus once met at the house of Sir Thomas More in London leading English lawyers. He said that they were "*doctissimum genus indoctissimorum hominum*" (a very learned race of very ignorant men) and he accurately described Taney. The use of the term "free whites" to describe voters meant that there might be slave whites, and by Taney's system of classification were slave whites citizens? They certainly, as slaves, could not vote under a suffrage of "free whites." Such is his hopeless bewilderment. In fact Taney was right on only one proposition. It was true, as the law then stood, that one could be a citizen of the United States and not a citizen of any State, but, when resident in a State, a citizen of the United States was a citizen of that State where resident. Every other of his legal propositions was wrong. His idea that citizenship could depend upon the right to vote or similar rights was entirely wrong. *U. S. v. Cruikshank*, 92 U. S. 542; *Boyd v. Nebraska*, 143 U. S. 135. His idea that the United States could not have colonial possessions under the Constitution never met any acceptance, and is answered by Porto Rico and the Philippines.

mistaken judgment decided was the rule or rules of law applicable, did not and could not make the law. The judges might be wrong as to their rule or application. He could have cited at least a half dozen of Taney's decisions to support the proposition. Lawyers every day so argued in the courts. No jurist, except a very uninformed one, now thinks that courts make law. From the very nature of law they cannot do so,[42] and in this matter Lincoln was right.

Lincoln's third proposition was that the Dred Scott decision was the entering decision to deprive by constitutional construction a Free State of the power to declare free a slave brought to reside within that Free State. Was he justified in this charge? Many "*dealbatores potentum*" (white-washers of the powerful) have blamed him. It is true that in a case in the Supreme Court probably five of the then justices had declared that each State, and in that case a Slave State, had the right to forbid the bringing of slaves within its boundaries.[43] Yet the personnel of the Court had changed, and no one could say what the Supreme Court would hold. But that ruling did not meet the point. The question was,

[42] A court under our jurisprudence can only decide upon a past transaction. Opinions of courts may be appealed to as evidence of what a rule is, but evidence to prove a rule is necessarily not the rule itself.

[43] *Groves v. Slaughter*, 15 Peters 449. See also *Rhodes v. Bell*, 2 Howard 397.

supposing that a State did not forbid the introduction of a slave, could it declare the slave free when introduced? This power the Free States insisted upon but cared little about excluding slaves.

Taney's Dred Scott decision in its essence had held slaves to be lawful, innocuous property on a level with horses and cattle. To free a slaveholder's slave was to confiscate a right of property. The power of a State did not extend to the confiscation of lawful, harmless property of a citizen of the United States or of another State entering a State, for the Constitution of the United States provided that the citizens of each State were entitled to the privileges and immunities of citizens in the several States.[44] One of those immunities was to have, keep and acquire property.[45] It was true that certain States did not permit their own citizens to hold slaves, but the Supreme Court could well hold that a State could

[44] Art. IV, sec. 2. In *Crandall v. Nevada*, 6 Wallace 35, in a powerful opinion, the Supreme Court was not satisfied to put its decision on this provision, since it does not cover citizens of the United States who are not citizens of States but of Territories. The Court based it on the ground that every citizen had the right to travel from State to State and presumably to carry his property with him, and quoted Taney in the *Passenger Cases*. But what would have been the effect of such an opinion before slavery was abolished? See the language of Taney quoted in this opinion, note 62 *infra*. What was already the law as to citizens of the United States is now imbedded in the Fourteenth Amendment to the Constitution.

[45] *Corfield v. Coryell*, 6 Fed. Cas. No. 3230, approved in *Slaughter House Cases*, 16 Wallace 97. The same sort of a clause was in the Articles of Confederation.

not by law confiscate one particular kind of such lawful property because the owners of it were disliked.[46]

But back of this situation was another question that was even more dangerous. Lincoln hinted it, but it was too perilous to discuss.[47] When a slaveholder brought his slaves across a State line, he did an act of intercourse or commerce between States. Congress could forbid such traffic between States, but it could also permit such traffic by its silence and it would be impossible to obtain legislation from Congress.[48] Everyone admitted that slaves were human beings and hence could be interstate passengers, although Kentucky had made them by law real estate, after the analogy of the medieval law of serfs, *adscripti glebae* (bound to the soil). The Constitution gave the Federal Government power over interstate commerce, and this power was

[46] So far as authority existed in the courts of a Free State, it was in favor of the State's right to free introduced slaves. *Lemmon v. People*, 30 New York 611.

[47] Lincoln in his speech at Springfield, June 16, 1858, pointed out that Nelson in an opinion had left a loophole to fit in a ruling that a State's control over slavery would be limited by the Constitution of the United States. Such a decision was probably coming. Lincoln did not say under what clause or power in the Constitution the decision would be made, but, of course, he meant the interstate commerce clause. See the "House Divided" Speech, paragraphs numbered 14 and 15. If the Constitution forbade a State freeing slaves brought into the State, Lincoln's proposition of "a house divided against itself" was inescapable.

[48] The Senate was controlled by the Slave States and their northern allies.

exclusive.[49] It was decided then and has ever since been the law that moving passengers or goods across State lines is interstate commerce under the exclusive control of Congress.

The negro slave brought into a Free State from another State was as a human being, a passenger, and as a slave, property. The original package doctrine was then settled as it has continued to be settled, and it was determined that the importation of property from one State into another was exclusively in the control of Congress until after the sale of the property in its imported form.[50] Certainly a slave in his imported form remained an original package until his owner sold him or tanned his skin into leather or ground his bones into fertilizer. Hence, on this view of the law, the slave's importation into a Free State, in his human being aspect, could not be forbidden by a State, and in his property aspect his sale as an original package in a State could not be forbidden by the State. All that was needed from the Supreme Court was another ruling on the line of the Dred Scott decision, and any slaveholder could

[49] *The Passenger Cases*, 7 Howard 283. *The License Cases*, 5 Howard 504. In an old case, *Elkinson v. Delieseline*, 8 Fed. Cas. No. 4366, it had been held by Justice Johnson sitting on the circuit that the South Carolina laws against free negroes coming into the State were invalid, because regulations of foreign commerce. South Carolina at that time took the decision with meekness but soon forgot it.

[50] *Brown v. Maryland*, 12 Wheaton 419. As to the original package doctrine, see *Bowman v. C. & N. R. Co.*, 125 U. S. 465.

take into Massachusetts his slave property and establish a slave market in the very shadow of Faneuil Hall at Boston and Freedom's banner would become "fustian" wherever it waved.[51] Lincoln, therefore, from a legal standpoint, was justified when he met the Dred Scott decision as the great step toward making slavery lawful, in all the United States and its Territories, North as well as South, East as well as West. He was also justified in his proposition that in time the Union would become slave or free.

[51] The word "fustian" is found in Tom Moore's "Lines Written from Washington":

"where bastard Freedom waves
Her fustian flag in mockery over slaves."

IV

THE NATIONAL LINCOLN

NOW I pass to Lincoln's legal positions while President, when he was compelled to decide constitutional questions that went to the very foundation of our nation and the integrity of its soil. To this task he brought the greatest of all the things that man has gathered in his progress from brutish savagery. That possession is culture,[52] which an Apostle of culture[53] has defined as requiring a sense for intellectual things, a sense for conduct, and an aesthetic sense. Accidental matters, clothes, conventional manners, education, have little to do with culture, and Aristotle has told

[52] In considering whether or not a man has culture, one must rid himself of the ridiculous ideas of those commonplace people, who have just enough artificial cultivation, little as it is, to criticize another's shortcomings. Culture is a fact. It depends upon fundamental things.

[53] Matthew Arnold. Lord Charnwood speaks of Lincoln as not having much of the knowledge that a statesman is supposed to know, but if he had told us what he supposed a statesman was supposed to know, it would have turned out probably that his opinion on the point was not valuable. Would any man say that the younger Pitt, or Perceval, or Aberdeen, or Lord John Russell, or Lord Palmerston, had, when each became Prime Minister, anything like the equipment of Lincoln, when he became President? The most absurd and astonishing statement about Lincoln is in a note in the fourth volume of Belloc's *History of England* (p. 156), where he compares Lincoln to Owen Tudor, the grandfather of Henry VII!

us that to dwell too much on these accidents is a sign of *aphuia,* by which he means a naturally inferior mentality. Culture requires a kind of mind that is open to matters of knowledge, a sense for the possessions of the intellect, and it is in its best form a power of dwelling and reflecting upon intellectual things and of aspiring to better things, until a man is enabled to comprehend this great and growing, progressive life of humanity that has made us what we are, and which must and will make coming men far more able than ourselves to set themselves so fitly and aptly to the eternal verities, that at last man's ordinary life will attain that ideal life, which for want of a better term we may call the image of Divinity.

Next, culture imports a sense for conduct in a man of natural or acquired qualities, such as courage, endurance, probity, kindness, gentleness, mildness, mercy, compassion, sympathy, self-restraint, toleration, simplicity, and even humility and lowliness, without vanity and self-conceit. Above all it means toleration and receptivity of ideas, the badge of the civilized man, the sense for just conduct toward others, the willingness to accord to others what we ask for ourselves, which is the true love of our fellow men. Marcus Aurelius, the best of all autocratic rulers, said: "Cultivate simplicity, never

compromise between right and wrong, and love your fellow men."[54] Shakespeare's great roll of virtues for a ruler[55] comprises "justice, verity, temperance, stableness, perseverance, mercy, lowliness, patience, courage, fortitude." Let someone tell us in which of these qualities Lincoln was lacking.

Next, culture requires in a man an aesthetic sense, some feeling for loveliness and beauty, at least in the written and spoken word. If one has a sense for beauty in the arts, painting, sculpture, architecture, music, the fashioning of artistic things or for the loveliness of nature's smile and even of her frown, it is well, yet many men of culture are densely ignorant or obtuse in such matters. But a sense for the beauty and meaning of words describing matters of knowledge and of life is true culture. Lincoln had beyond doubt that sense, as I have explained regarding his gift of expression.

But he had more than culture, though it is a surpassing possession. His life as a lawyer, his contact with all classes of people, his comprehension of, his sympathy with, all ordinary men, made him an almost unerring judge of large political movements or what we moderns truly call "herd psychology," and he was not deceived as to the

[54] The *Meditations* or *Private Journal of Marcus* is in Greek. It is useless to attempt here Greek letters.

[55] *Macbeth.*

meanness or the nobility of humankind. Best of all, he had the strength that

> "is of the plain root-Virtues born.
> It is the offspring of the modest years."

Then, too, his great talents as a lawyer, his power of appeal to men by pre-eminently simple, clear, persuasive words, his ability to go to the bottom of a proposition in law or political policy and to explain it, made him in that respect the best endowed of all our Presidents. In a country like ours, where so much statecraft depends upon legal adjustments, this equipment is a priceless advantage. Above all, he had calmness, deliberation and a power steadfastly to withstand political pressure. He had, too, the tact and dexterity to endure and to use and to conciliate to good ends, wrong-headed men and even men who were essentially base.[56] I submit, is it not crass stupidity on great matters for small-minded men to say that such a man as Lincoln was badly fitted for the Presidency, because he was not a Brummel or a classicist[57] or an epicure or a Turveydrop?

[56] This power of managing men some speak of as his being a "master politician." Many men, who are in fact pure demagogues, think themselves politicians in this better sense. Inflexible, unadaptable, impractical people cannot understand this ability. Lincoln obtained his own way with the same people who impeached Andrew Johnson. Lincoln would have brought those hard-headed Radicals, as they were called, to his own way of thinking.

[57] It is not necessary to point out the difference in speaking of a man as a classicist, i.e., one versed in classical learning, and a man as a classic. Lincoln had become a classic in his lifetime. The same was said of Arnold.

Lincoln confronted on March 4, 1861, a Secession and Rebellion accomplished and complete in eight States, soon to be complete in three more. The inept Buchanan had held that no State had the right to secede but that the Nation's government had no right to prevent a State from seceding, and therefore he had made not the slightest effort to assert the National authority and had permitted the Secessionists to seize the government's defenses and property. Lincoln immediately took his stand on the theory of law that no part of the Nation had the power, except by irresistible force of successful war, to disrupt the Nation and therefore he must resist with all available power the division of the political community and the severance of its soil. Here he was on the highest ground in the science of jurisprudence.

To find the historical background for Lincoln's view of the Nation we must go far afield in the history of law and institutions. I do not mean to say that Lincoln necessarily knew all this history, but his power of reflection upon what he saw around him gave him the true conception. It is enough here to say that the theory of Greek and Roman law was that all governmental power emanated from the people, a political body, which was the ultimate legal reality, and that a government was merely a form the people had

chosen. The Roman Digest, the result of many ages of Greek and Roman law, laid it down, under an absolutely autocratic ruler, that the Emperor enjoyed all his sway and power because they had been given him by the people and the inference was, as stated by a great Commentator, that the people could resume that power. Cicero referred to these bodies politic, when he said that nothing in human life is so acceptable to God as these communities of men associated in the bond of law. Such social communities exist before their governments or bonds of law, or at least they are coeval with the social community. Perhaps it may be apposite here to indicate what have been general social aggregates and the reverse. In the kingdom of Poland there was never any social agglomeration of Letts and Poles, but as to Poland itself there was a Polish nation which in spite of a century of division under Prussian, Austrian and Russian separate tyrannies, lived on. Taking another instance, it is apparent that England and Scotland, even after long centuries of warfare, became at last the one social body of Great Britain, yet Ireland never became an actual political community with Great Britain. In the Austrian Empire there was no actual national cohesion between Austria proper and Bohemia and Hungary. The German Empire was for centuries a mere confederation until it coalesced under the work

of Bismarck. Italy just prior to 1860 is another case in point.

Singularly enough, this doctrine of the social aggregate, fundamental in all government, was utterly unknown in England whence we derived our common law. Owing to the accidental domination of the feudal system, the common lawyers figured the Nation to be a governmental corporation of King, Lords and Commons, which they have called the body politic, and the King by charters granted rights to his subjects. This form of thought destroyed all chance for English juristic thinking on the nature of the State.[58]

In all governmental matters this body social is a unity. Its existence is dictated by economical pressures so powerful that puny men, or Presidents or Kings or courts, cannot resist them. In the grasp of such forces all men stand helpless as before the very eyes of Fate. Webster described this body politic in strong oratorical form as our Union, when he said: "The Union is the association of the people under a constitution

[58] Locke is an exception but he was so thoroughly British and so enslaved by the British conditions, that he could not conceive of changing the Constitution except by revolution. See Carpenter, *Development of American Political Thought*, p. 17. In England a howling mob destroying property has always been considered a legitimate political argument, and perhaps it was true that under their system it is the only effective argument. At the same time equality before the law, which is justice, has never been more thoroughly acted upon than in England, when it has been a question of legal rights.

of government, uniting their power, cementing their present enjoyments, and blending, in one indivisible mass, all their hopes for the future."[59]

Our Supreme Court in its earliest years, when it happened to have two great jurists in it, Willson and Jay (Willson the greater, probably the best theoretical jurist ever in the Court) decided[60] that confusion arises from using the word "Nation" in three senses, one the body politic, next, the territory of that body politic, third, the form of government of that body politic; that in truth the word means the political body of men who have a territory which they occupy, that the formed cohesive political body must precede and always had preceded its form of its government, that the form of government is not the body politic, as it is in England;[61] that in our country the political body, the whole people of the United States, being an already united Nation, divided into convenient parts called States, adopted, out of the plenitude of its power to control its destiny, our Constitution as a form of government. This conception has always remained the

[59] Webster, *Works*, vi, 211, "The Constitution not a Compact."

[60] *Chisholm v. Georgia*, 2 Dallas 419; *Penhallow v. Doane*, 3 Dallas 54. Chief Justice Chase, in *Texas v. White*, 7 Wallace 700, borrowed this material but he was careful to make no use of quotation marks, and he did not refer to *Chisholm v. Georgia*.

[61] *Chisholm v. Georgia*, 2 Dallas 419, points out the lack of application of English legal conceptions to our theory.

doctrine of our Supreme Court,[62] and long after the Rebellion the Court said that a Nation presupposes a body politic, with an organized government, recognized officials, a system of laws and external independence, held together by the cohesive force necessary to make a Nation.[63] There is but *one test* of such a political entity composed of transitory parts, which in unchangeable constancy is passing in its parts through the continual process of decay, death, renovation and progression; and *the test* is, does it have and will it keep the actual coherence of a political body?

Lincoln placed himself squarely on this ground when he spoke of his oath to preserve "that Nation of which the Constitution was the organic law"; and he asked: How "was it possible to lose the Nation and yet preserve the Constitution"? It

[62] Taney, original Federalist but a converted States Rights Democrat, almost reached this conception when he said in the *Passenger Cases*, 7 Howard 283: "Living as we do under a common government, charged with the great concerns of the whole Union, every citizen of the United States from the most remote States and Territories is entitled to free access, not only to the principal departments established at Washington, but also to its judicial tribunals and public offices in every State in the Union. *** For all the great purposes for which the Federal government was formed we are *one people*, with one common country *** and as members of the same community must have the right to pass and repass, through every part of it, as freely as in our own States." He here reverted to his belief as a Federalist. The great conception of one political body had brushed him with its wings, but he failed to find any healing in the wings.

[63] *Montoya v. United States*, 180 U. S. 261. So far as I know, this is the only opinion in the Supreme Court which uses the phrase "cohesion" as to a nation.

was in their failure to recognize this great juristic principle, that a Nation exists not on paper or by means of a paper, not as a form of government, but as an aggregation of living men, and as the result of powerful natural causes that men cannot control but which control men, that made the reasonings of Calhoun and his school sound like the arguments of a lot of pettifogging lawyers wrangling over the terms of a wretched partnership to deal in cast-off political clothes.[64]

[64] The whole question depended upon the method of approach. The States Rights arguers seem to have been entirely innocent of any knowledge upon the nature of a nation. It never occurred to them that the existence of a nation depended upon a matter of pure fact, not upon inferences from a written document. Since the Civil War the influential authority has been Von Holst, who was innocent of any legal constitutional learning. He, being a German, was obfuscated by the nature of the German Empire, a loose confederation of independent states, sometimes warring against each other. The German Empire proclaimed at Versailles in 1871 seemed to be an attempt to create a nation by a document subscribed by the rulers of the different German states. But it was soon apparent and was proved in the World War that Germany was the result of a consolidated people. All of Von Holst's propositions in his *Constitutional History* and in his *Life of Calhoun* are a mistake. Calhoun and his school treated the Constitution as a cause of cohesion and not as a result. The argument should have begun with the Constitution as merely a form of government, not as a compact creating a confederacy. Both Marshall and Taney and the earlier decisions of the Supreme Court emphasized the existence of a political body known as the People of the United States. Whether it existed was a fact, not a theory, not an inference from a written document. But the failure of political thinkers to comprehend the age-old truth led to the peculiarly provincial, unintelligent reasoning upon the creation of this United States. Much of this sort of reasoning was over the word "sovereignty" and the term "Sovereign States," but it all represented an arrested political development. Not one of those people comprehended that the People of the whole country had become and was in fact a body politic, indissoluble in fact except by violence. In no way did Lincoln more clearly show his strong legalistic common sense than in refusing to discuss sovereignty, and no theoretical juristic speculation

If there be a Nation, there is in the instinctive souls of its preponderant mass of citizens, inherited through untold ages from the original savage, who will fight to preserve his tribe and to hold its territory, the deep-rooted sentiment that makes civilized men ready to fight for their

is more barren than the one on the meaning of sovereignty. First must be settled what is meant by the term. Historically it has two totally different aspects, one external, the other internal. The first aspect is the original, meaning a freedom from external control. This concept arose in Europe when the sovereigns of the different states or nations in Europe claimed independence from the power of the Pope. Bodin first formulated the theory and as the ruler, a sovereign, was considered as the state (*l'état, c'est moi*), the word "sovereignty" was coined to express the idea that the sovereign and his state were independent of external control. But the fact of such independence never existed. It does not exist as an absolute fact, because all civilized nations are bound by the rules of international law and no one Nation can change a rule of international law. *The Nereide*, 9 Cranch 388; *The Scotia*, 14 Wallace 170. International law is therefore a supernational law. A Nation may breach that law but the law remains. In its second aspect the word came to be applied to what in the Nation has uncontrolled power. Hobbes found this power in England in the sovereign. In its sense of internal sovereignty the term is supposed to denote where within a Nation itself resides the uncontrolled power. As between the National government and the State governments, the word "sovereignty" of the National government over the States has a meaning of internal sovereignty. But as regards the States, the word "sovereignty" has a meaning of independence of external control. This analysis shows how futile is the reasoning of our political theorists upon the word "sovereignty." The States, of course, are not in the aspect of external sovereignty, sovereign and independent, because they are bound by the super-law of the constitution which no one State can change. As to the National government, it also is not sovereign because it also is bound by the constitution. If then we go back to the political bodies constituting the States, they are not sovereign because the national body politic can, whenever it desires, change the constitution, so as to take away any State power, but no State political body can change the Federal super-law. For the late matter on sovereignty see Carpenter, *Development of American Political Thought*, the last chapter. In the science of jurisprudence there is no such doctrine as that of absolute sovereignty, either external or internal.

Nation and its land. This great emotion we call patriotism and to that emotion Lincoln appealed when in tones of such haunting melody he likened the music of patriotism in our hearts, to harps struck by angel hands: "The mystic chords of memory stretching from every battle-field and patriot grave to every living heart and hearthstone all over this broad land will yet swell the chorus of the Union, when again touched, as surely they will be, by the better angels of our nature." [65]

Basing himself on the great legal conception and appealing to the flame in patriotic hearts that glows upon the legal altar, Lincoln asserted that the war was waged to preserve the Nation, the body politic, from disruption and its land from division. He avowed that if he could save the Union even by letting slavery alone, he would do it. If he could save the Union by freeing the slaves, he would do that. He knew that love of country was stronger than reasoning [66] and he knew, too, that the preservation of the social body was the lesson of the ages.

[65] This passage, originally in a crude form proposed by Seward, was recast by Lincoln. Masters called this sentence "bombast." Whistler once spoke of the futility of pouring music into the ears of a deaf man. Macartney (p. 125) gives the credit for this passage to Seward but Macartney has no literary taste. He should have remembered,

> "Though old the thought and oft exprest,
> 'Tis his at last, who says it best."

[66] *Amor patriae ratione valentior*—Ovid.

Much has been said with shallowness about the worship of the Constitution in our history as if that were the force that made us a Nation, but the great mass of the people knew little of the Constitution and would not have understood it, if they had read it. The Constitution is a shell, the kernel is our country. It was love of country, the spectacle of the Great Republic, her varied landscapes, her fertile fields, her harvests, her growing cities, her great rivers, rolling on forever their waters to boundless seas, the nobility of their Country and its Flag, that moved the hearts of the men who rushed to the defense of the Union. It was, as the poet sings, the love of

> "The sparkling and hurrying tides and the ships,
> The varied and ample land—the South
> And the North in the light—Ohio's shores and
> flashing Missouri,
> And ever the far-spreading prairies covered with
> grass and with corn." [67]

Yes, and the regions farther West, "where rolled the Oregon," and where the banners of the Republic were dipping "their fringes in the Western Sea." There are no points of the compass on the chart of patriotism.[68] This emotion of patriotism

[67] Walt Whitman. Such verse as Whitman's does not "build the lofty rhyme," except in a masterpiece like "My Captain."

[68] R. C. Winthrop. John Bright in a famous peroration has much the same thought. "The leaders of this revolt (Secession) propose this monstrous thing—that, over a territory forty times as large as England, the blight and curse of slavery shall be forever perpetuated. *** I

welling up in the heart is the very "unbought grace of life, the cheap defense of nations." Yet patriotism lives purely upon economic factors, the great economic interests, that, in the end, control the destinies of men.

Let me draw your attention to another fact. The Secessionists were not making a Revolution, nor were they asserting what is called "the sacred right of Revolution." Legally speaking, Revolution is a change by the body politic of its form of government dictated by force. This is a purely English conception and it has always by the English been recognized that superior force justified revolution because there was no other method in which to change the form of government, if the government itself resisted a change. Lincoln in his speech in Congress on his "Spot Resolutions" clearly showed that he had not as yet thought out the true doctrine as to Revolution. He was misled by the English conception and by the false

cannot believe that civilization in its journey with the sun will sink into endless night in order to gratify the ambition of the leaders of this revolt, who seek to

'Wade through slaughter to a throne
And shut the gates of mercy on mankind.'

I have another and a far brighter vision before my gaze. It may be but a vision but I shall cherish it. I see one vast confederation stretching from the frozen North in unbroken line to the glowing South, and from the wild billows of the Atlantic, westward to the calmer waters of the Pacific main,—and I see one people and one language, and one law and one faith, and over all that wide continent, the home of freedom, and a refuge for the oppressed of every race and every clime."

analogy of our Revolution. Under the American system the theory was adopted that the change of form should be peaceful and according to law by amending the Constitution of government. Revolution, however, is not and never was the disruption of the body politic or the disseverance of its soil, even under the English conception. Our Colonies never were in fact considered as a part of the body politic of Great Britain. Our Revolution was merely a change of the form of government of the political body of the Colonies *that had been formed by the pressure of Colonial development.* The Declaration of Independence asserted this when it said by Jefferson that *one people* was dissolving the political bands that bound them to another people. It was this people, the social community, called the United States, that was compelled to meet in the Civil War the supreme test of coherence. Through blood and slaughter, drawing strength from the very steel, the great social community endured the test and lived on, never to be dissevered.

V

THE LINCOLN CONSTITUTIONAL FORMULA

LINCOLN was confronted not only with a condition of insurrection, but of actual war. While the national authority had been set at defiance, its property and munitions seized, its officials and troops expelled, while, contrary to the Constitution, the Southern States had entered into a confederacy, and were enlisting and maintaining troops,[69] and while hostile armed bands were converging on the Capital of the Nation, he waited until the Flag was fired upon at Sumter. Then at the exact moment he struck in the midst of the wild burst of patriotic fervor.

Following his accustomed manner, Lincoln had been thinking out to the end the legal situation and what he could do and how to do it. His Attorney-General, Bates, was of not much use.

[69] Art. I, sec. 10: "No State shall enter into any Treaty, Alliance or Confederation. No State shall, without the consent of the Congress, keep troops in time of Peace, nor enter into any Agreement or Compact with another State." It is apparent that these prohibitions in the Constitution forbade not only the Confederacy but also the warlike preparations of the Southern States. There seems to be no tenable theory, even on the part of the Secessionists, to justify the seizure of the forts, arsenals, munitions, mint, money and property of the United States, all which acts were undoubted acts of war as well as thieving.

He was a dull, old-fashioned lawyer without insight. Seward was passing from panic to folly. Whiting, the authority on War Power, was not yet in the service of the Government. Lieber, the authority on international law, was not in the State Department. Lincoln had to think for himself and he took no one into his confidence. He never announced before hand what he was going to do, except as to Emancipation, and that was not an actual exception. Silent and inscrutable,[70] he, by his thinking, had constructed for the crisis the greatest general legal *formula* that had been put in form since Hamilton, construing the proposed Constitution, with some little help from

[70] The clear understanding of Lincoln's constructive work upon a few, widely separated provisions in the Constitution, and a very few decisions of our Supreme Court, can come only after a long and diligent consideration of the dry and often uninteresting details of many decisions of our Supreme Court made upon his acts. Much has been said about Lincoln's secretiveness, but

> "Count me o'er Earth's chosen heroes,
> They were men who stood alone."

He had the kind of unshaken resolution,

> "That never falters nor abates,
> But labors and endures and waits
> 'Til all that it foresees it finds,
> Or what it cannot find, creates."

Or, to put it more prosaically, his reticence was due to his legal training. In such matters no man of discretion confides in anyone more than he can help. There is nothing more excruciatingly absurd than President Johnson, while his hard-working lawyers were getting ready his case for the Impeachment Trial, announcing in pompous tones to pestiferous newspaper reporters, every new discovery in the law made by his counsel. Stanbery, his chief counsel, was required to deal firmly with his client.

Madison and Jay, wrote the collection of legal *formulae* in the Federalist, obtained the adoption of the Constitution, successfully launched the new government, and furnished the material for Webster and other lawyers to put before the Supreme Court, which resulted in the epochal decisions of Marshall.[71]

A legal *formula* is a reconciliation of different opposing legal considerations or courses to follow that look far ahead to probable or certain coming events. In my time the finest piece of legal work in constructing a *formula* was that of Stanley Matthews in regard to the Hayes-Tilden electoral votes, whereby, in the midst of a maze of statutes and discordant facts, he evolved a legal position that would count every contested electoral vote for Hayes, and he was compelled to cover every vote.[72] Judges are never of much account in devising such a *formula*. It is not their

[71] Hamilton's legal *formulae* may be found in the Federalist. His acts show how he followed them out. He was willing to trade with Jefferson in order to attain his ends. From that trading it resulted that Washington, our Capital, is on the border of Virginia. That was a small price to pay for all that Hamilton accomplished in national finance, but the location of the Capital in its wretched red soiled offensiveness has always been a great misfortune for the country.

[72] I am here speaking with appreciation of only the legal ability of Matthews. He became a justice of the Supreme Court. In point of sheer legal acumen, of powerful judicial expression and of complete independence of thought, he has never been surpassed in our Supreme Court. If one could forget his unfortunate statements as to the currency, of which he knew nothing, his judicial career would entirely redeem his folly in being in politics. A political career has done great harm to many a lawyer and some of them were legal giants.

business. It must be devised by the lawyer for the judges. *The test of a legal formula, and its only test, is, will the court support it in the actual decisions of lawsuits?*

Lincoln's *formula* is now perfectly plain, but it can be worked out only by reference to his acts. It seems, as we look back upon it, perfectly natural, but when one puts himself in Lincoln's place, looking out over a darkened sea with here and there a light from a prior decision, it is a marvel that he could have worked out a theory of law that would furnish a course in which to proceed which was legally correct in every way. It is strange that no one has ever taken the trouble to verify his formula. It was one of mixed law and politics but its basis was purely legal. He did not know how far he could rely upon Congress and how much of a nuisance Congress would be, when called together, but in all constructive work it was a safe inference, from our then and our present history, that Congress would be a pronounced nuisance. Lincoln must hold the Border States to the Union, and he must present Congress with an accomplished fact, so that all it would have to do would be to vote the appropriations and, if necessary, ratify his irreversible acts and give him some few statutes. Above all, he had before him a Supreme Court, with a majority sullen and resentful, and some hostile State courts. He

must take no legal stand that the courts would not support.

He had decided, first, that no part of the body politic, States or other parts, could secede from the Union, that the firing upon the Nation's flag in its exclusive territory, was an act of undoubted war and rebellion; that, while he had no power to declare war, he could legally recognize an existing war, civil or foreign, and his act in so doing would bind all the departments of the government; that under a statute, coeval with the Republic, he could call the State Militia into the Union Service; that he could as Commander in Chief of Army and Navy, which the Constitution made him,[73] call for volunteers to enter the Army of the United States. It would seem that during the Mexican War Lincoln had reached the conclusion that if there was an act of hostility committed against us by the Mexicans, the President could recognize the existence of war without an act of Congress. President Polk had claimed such an act of hostility to justify his statement that a war existed. Hence Lincoln proposed his famous "Spot Resolutions" in order to ascertain the locality of Polk's claim of an act of hostility. In Lincoln's speech on those resolutions, he did not state the true juristic doctrine as to the so-called right of revolution, as we have stated it above.

[73] Art II, sec. 2.

Lincoln must find the form for that recognition of war, the irrevocable act, and he did find it in proclaiming a blockade.[74] From the existence of a state of war, it would follow that he, as Commander in Chief of the Army and Navy, could wield all the great War Power of the government which in time of war and in the theater of war was full and indivisible. That War Power would be given him by international law. That War Power would carry with it control not only of all military operations, but control of all the territory occupied by military operations or gained from the enemy. He decided that it would give him control of the disloyal element in the North. He could arrest by military authority, could suspend the operation of the writ of habeas corpus, he need not wait on the dilatory and often futile actions of civil courts. He would have in his hands the resources of military law, of military government over the regained Secession territory, and all the resources of martial law. Finally, when the war was over, the Secession territory could be retained as conquered territory in his hands as Commander in

[74] The President has power to recognize a state of war, whether the war be with a foreign nation or a civil war, and the President's act upon that matter is conclusive. *Matthews v. McStea*, 91 U. S. 7. The same is true of a Governor of a State in recognizing that a condition of insurrection exists. *Moyer v. Peabody*, 212 U. S. 78. The date of the blockade proclamation was the date of the beginning of the Civil War. *The Protector*, 12 Wall. 700.

Chief until it was decided how it should be again fitted into the Union.[75] This general *formula* was perfectly plain and its working out is no less plain when we consider what Lincoln did, but a mistake in any act would have wrecked his *formula*. In a storm of detraction, of misunderstanding, even of ridicule and abuse, he looked steadfastly, without shrinking, into the inexorable eyes of Fate, saying: "If I am right it will little matter what men say; but, if I am wrong, the oaths of ten angels that I am right will not alter the result." He who says,

> "Though my works
> Find righteous or unrighteous judgment, this,
> At least, is mine, to make them righteous,"

has reached the height of moral greatness.

He insisted on revictualling Fort Sumter against the almost unanimous advice of his cabinet, while the Seceders "were bristling their angry crests and snarling in the gentle eyes of peace.[76] The next day after Fort Sumter fell he ordered the State Militia into Federal service and called for volunteers. His call for volunteers enlarged the army establishment and he frankly

[75] All the authorities are cited *infra*.

[76] Shakespeare, *King John*. Lincoln sent Lamon to South Carolina to find the actual feeling in the South and there was no question upon Lamon's report but that the then Seceded States would begin a war, rather than permit the fort to be relieved.

admitted that he exceeded purely executive power and that his act must be ratified by Congress, which he had no doubt would be done and which was done. Had he not asked for volunteers he would have made an irretrievable error and would have wholly disorganized the patriotic movement. But these were acts of preparation. In order to get his *formula* into action, his unequivocal act was necessary, to show whether this situation was to be treated as a mere internal insurrection or as an actual war. He decided in favor of war, because he knew that the South would fight and he knew that his coming act would erect the Secessionists into a belligerent. His coming act would recognize the actual fact. His unequivocal act was five days after Sumter's fall, on April 19, 1861, to make the insurrection legally this actual war by proclaiming a blockade of the South, not a municipal blockade, not a mere closing of ports, not a paper blockade, but an actual war blockade notified to foreign nations.

This meant, of course, that the Secessionists were recognized as a belligerent, since a declared blockade is an actual recognition of war. Foreign nations must of necessity recognize the rebellious citizens as a belligerent. But the fact of war recognized, at once became binding upon all departments of the government and the War Power and

the Presidential power in war as Commander in Chief at once came into operation. This was the one decisive act from which all the other consequences flowed.[77]

[77] It is a curious fact that not only the great mass of the country but even Lincoln's cabinet did not know the meaning of Lincoln's act. If our own country recognized the Secessionists as a belligerent, all foreign countries were bound to accord to them belligerent rights. Yet Seward, Secretary of State, with amazing fatuity, denounced England and France for so doing. If the South was a belligerent, it followed that its warships must be recognized as those of a belligerent. Yet Secretary Seward wrote papers denouncing those warships, the Alabama, the Florida, and the Shenandoah, as "pirates." Lincoln simply let Seward rave on. Why should he take anyone into his confidence? Even after the war was over, our lawyers at the Geneva Arbitration never saw the point, and built up a claim for billions of dollars as indirect damages on the act of Great Britain in recognizing the South as a belligerent. It is no wonder that President Grant, instructed by his Secretary of State, Hamilton Fish, spoke of the "indirect damage humbug." Our Minister to England, one of the Adamses, warmly seconded Seward. Sir Roundell Palmer, the English counsel, refused to consider the wild proposition and the then Secretary of State waived the whole claim of damage resulting from belligerent recognition.

VI

THE WORKING OF THE FORMULA

PROCEEDING under this formula, now perfectly plain, he took control of all the districts where war was being waged. He appointed Military or Provisional Governors in the Border States, Kentucky, Missouri, Tennessee, Western Virginia. They came under his military rule, as also did the District of Columbia. Maryland had an earnest and loyal Governor and he was left alone. All the seceding territory was, of necessity, under his military control, so far as he could reduce it.

While by his system he admitted the rebelling Southerners to the rights and conditions of a belligerent, he would go no further, and here was the place in his *formula* that called for prescience and sagacity. Their Confederacy and their compact among themselves was forbidden by the Constitution and he decided that he would never, by act or word, recognize the Confederacy.[78] He

[78] In *Hickman v. Jones*, 9 Wallace 197, the Supreme Court stresses the fact that the executive had recognized the Southerners as belligerents but had never recognized the Southern Confederacy of the rebellious State governments. See, for the constant mistake of Southern writers since the Rebellion, *The Reward of Patriotism*, by Lucy Shelton Stewart. In spite of the law, now settled beyond recall, the Southern extremists

would act solely on the theory that the Southerners were rebellious citizens. While he would admit them to belligerency as an armed body of men entitled to the rights of war, the Confederate government or the Seceding States or their Seceding State governments, except in their lawful internal relations to their citizens, he would not by act or implication recognize as a government or governments. The Seceding State governments had put themselves out of their lawful relations, duties and obligations to the Union. He waged war against a body of men, not a Confederacy of States united by Compact or Constitution since the Constitution forbade such a Confederacy or Compact. With the Rebels he would wage war, conquer their territory, exchange prisoners and do all the usual acts concomitant of war, but as to all other matters he would never concede the existence of the Confederacy as a government of any kind.

He thus reconciled belligerency with the fact that the Confederacy was unlawful and carrying on an unlawful Rebellion. All the acts of the

still assert the legal right to secede. The ordinary Southern historical writer never seems to have ascertained that the Supreme Court of the Union has settled some facts. Such writers presume to talk of law. Thus *The Story of the Confederacy*, a work as late as 1931, asserts (p. 41) that "in point of law" there was no justification of Lincoln's declaration of blockade. Such ignorance is appalling. His statement (p. 67) that Lincoln declared Southern privateers to be pirates shows a mistaking of Lincoln for Seward.

Southerners in aid of Rebellion were unlawful acts and could never give rise to any rights, individual or governmental. As belligerents, however, all the ordinary transactions between citizens in the various revolted States and the decrees of their courts would be recognized, but every judgment or decree of a court erected by the Confederacy was a nullity. Thus he drew the line between acts consonant with the States' relation to the Union and acts hostile to those relations under the Constitution. This theory, difficult as the *formula* was, he consistently maintained and it met the approval of the Supreme Court.

All property of the citizens of the rebellious States (and they were all hostiles under the belligerent rule of international law, whether loyal or not)[79] was by his *formula* enemy property, subject by international law to capture or confiscation,[80] including their slaves. Under his power as Commander in Chief, he exercised all civil and military power,[81] issued the Emancipation Proclamation, appointed governors for conquered territory, extended over it military government, including martial law, instituted courts by his own order and in course of time he as Commander in Chief convoked a constitutional convention in

[79] *U. S. v. Cooke*, 2 Wallace 258; *The Prize Cases*, 2 Black 635.

[80] *Page v. U. S.*, 11 Wallace 268; *Young v. U. S.*, 97 U. S. 39; *Hall v. Coppel*, 7 Wallace 542.

[81] *Coleman v. Tennessee*, 97 U. S. 509.

certain States and dictated their relations with the Union.[82] This was all under the general theory of his *formula* and now we come to the test of it by the courts, and this we must recognize is the ultimate and only test of a legal position. The decisions are Lincoln's triumphant vindication.

[82] *Texas v. White*, 7 Wallace 700.

VII

THE TRIUMPH OF THE FORMULA

FIRST it is to be said that no foreign government ever went any further than Lincoln. Not one power ever recognized the South as a lawful government, but merely as a belligerent. No power ever received a minister from or sent a minister to the Confederacy. In international law his theory held good.

Next as to his theory of the unlawfulness of Secession, his right as Commander in Chief to coerce any number of revolting citizens was, of course, upheld. The doctrine of Secession is a doctrine of treason and no State nor body of citizens can take itself out of the Union.[83] The Rebellion was without any sanction of law. The people of the Union were held to be an integral mass and their unity and identity were not affected by the segregation by State lines for the purposes of State government and local administration.[84] The courts as a matter of course held that all the acts of Secession by the States were null and void[85] and all acts of the States in aid

[83] *Daniels v. Tearney*, 102 U. S. 415; *White v. Hart*, 13 Wallace 646.
[84] *White v. Hart*, 13 Wallace 646.
[85] *Daniels v. Tearney*, 102 U. S. 415.

of the Rebellion were null and void.[86] All courts established by the Confederate government were courts without any lawful authority and their acts were nullities.[87] Those courts were not even acting courts so as to give legal efficacy to any of their acts.[88] The allegiance of all the revolted citizens to the United States remained. It was never changed.[89] As Lincoln held, so it was decided, that all alliances and confederations between the Seceding States were forbidden by the Constitution[90] and every compact between States without the consent of Congress was likewise forbidden,[91] and the constitutional disabilities of the Seceding States and their obligations under the Constitution of the United States were not affected by the Rebellion[92] although the rights of a Seceding State as a member of the Union were suspended.[93] The Supreme Court approved and relied upon his course in never recognizing the Confederacy nor any of the Seceding State governments.[94]

Lincoln himself would never decide whether the Seceding States were ever out of the United

[86] *Dewing v. Perdicaries*, 96 U. S. 193; *Taylor v. Thomas*, 22 Wallace 479.
[87] *Hickman v. Jones*, 9 Wallace 197; *Williams v. Bruffy*, 96 U. S. 176.
[88] *Hickman v. Jones*, 9 Wallace 197.
[89] *Texas v. White*, 7 Wallace 700.
[90] *Ford v. Surget*, 97 U. S. 594.
[91] *Virginia v. Tennessee*, 148 U. S. 503.
[92] *Gunn v. Barry*, 15 Wallace 610; *Mauran v. Insurance Co.*, 6 Wallace 1.
[93] *Texas v. White*, 7 Wallace 700.
[94] *Hickman v. Jones*, 9 Wallace 197.

States. He said that it was a metaphysical question. He was too cautious and wary, too well trained in not committing himself to unnecessary legal positions, to say that in all respects, they were out of the Union. Theoretically the Seceding population could never get out of the Union as a fact until they won the war. He might have used a legal term, by saying that while they remained in the Union, they nevertheless *sub modo* were out of the Union so far that their territory became, when they were conquered, conquered territory. It was one thing if you looked alone to the permanent unbroken body politic. It was another thing if you looked at territory alone, which became for purposes of war and government conquered territory. Hence he declined to pass on the question as merely a form of logical chaff-cutting not concerned with realities.[95]

As a part of his *formula* it was held that so far as the State governments in the South performed their functions under the Constitution, they were acting lawfully. Private transactions between rebelling citizens were not forbidden.[96] Private citizens could obey the rebelling State governments.[97] The State courts of those States could continue in operation, and their decrees and judgments upon

[95] Lincoln upon this question is shown by Nicolay and Hay.

[96] *Baldy v. Hunter*, 171 U. S. 388; *Ketchum v. Buckley*, 99 U. S. 188.

[97] *Thorington v. Smith*, 8 Wallace 1; *Masterson v. Howard*, 18 Wallace 99; *Ford v. Surget*, 97 U. S. 594.

private rights and not in aid of the Rebellion were binding, as were such acts of the State government and its departments to the same extent.[98] Private transactions were not forbidden.[99] Yet the distinction was plainly made when it came to an excuse for an act in aid of rebellion,[100] and such acts were condemned.

Lincoln's theory as to the War Power of the Government and his War Power as Commander in Chief was upheld. The law is and was that the War Power is entire and indivisible and not limited by any other part of the Constitution.[101] As President he could recognize the existence of the state of war and as Commander in Chief he could lawfully declare the blockade which recognized the fact of war.[102] He, by the fact of war, became

[98] *Horn v. Lockhart*, 17 Wallace 570; *U. S. v. Home Insurance Co.*, 22 Wallace 99; *Williams v. Bruffy*, 96 U. S. 176; *Sprott v. U. S.*, 20 Wallace 459.

[99] *Baldy v. Hunter*, 171 U. S. 388; *Ketchum v. Bruckley*, 99 U. S. 188.

[100] *Thomas v. Richmond*, 12 Wallace 349; *Richmond v. Smith*, 15 Wallace 429.

[101] *Nor. Pac. R. Co. v. North Dakota*, 250 U. S. 135; *Selective Draft Cases*, 245 U. S. 366; this last case points out that the Confederate government acted on the same theory during the Civil War. It is true, of course, that in parts of the country not affected by war the Constitutional limitations will apply. *U. S. v. Cohen Grocery Co.*, 225 U. S. 81. See also *Hamilton v. Kentucky Distilleries*, 251 U. S. 136. Lincoln did not have the advantage of Whiting's *War Powers*. It was published as a pamphlet in 1862. It was added to and republished in 1864, after Whiting was in the service of the government. It was published with further additions in 1870. Some of its positions cannot be defended but its general theory was the law.

[102] *The Prize Cases*, 2 Black 635; *Masterson v. Howard*, 18 Wallace 99. These cases were the first test. The position of Lincoln was upheld by five of the court, Wayne, Grier, Miller, Swayne and Davis, while

endowed with all the powers annexed to that command by international law,[103] and these powers are limited only by the usages of war.[104] He could institute military government in the theater of war. This military government was not restricted by any of the laws of the district and came not from the Constitution but from the laws of war.

All the territory wrested from the enemy came under his absolute rule of Commander in Chief as conquered territory, over which he could appoint governors, institute military courts, enforce martial law and do all the other acts permitted by international law. In ruling the conquered States there was not one of his acts that was not upheld by the Courts. The conquering of the territory carried with it the right to take all steps considered necessary to prevent a recurrence of the Rebellion.[105] The President could take the measures necessary "to reconstruct" or to put the rebellious State into condition to resume its lawful relations with the Union and to that end he could call a constitutional convention in the State, prescribe

Taney, Nelson, Clifford and Catron dissented. The superb argument of Dana is unanswerable. Wayne of Georgia was a Jackson appointee in 1835. Grier of Pennsylvania was appointed by Polk in 1846.

[103] *The Grapeshot*, 9 Wallace 129; *Mechanics Bank v. Union Bank*, 22 Wallace 276; *Dow v. Johnson*, 100 U. S. 158; *The Prize Cases*, 2 Black 635; *Mrs. Alexander's Cotton*, 2 Wallace 404; *The Venice* (*U. S. v. Cooke*), 2 Wallace 258; *The Hampton*, 5 Wallace 372; *Hall v. Coppell*, 7 Wallace 542; *Tyler v. Defrees*, 11 Wallace 331.

[104] *U. S. v. Diekelman*, 92 U. S. 520; *Heffernan v. Porter*, 3 Coldwater 554.

[105] *White v. Hart*, 13 Wallace 646; *Raymond v. Thomas*, 91 U. S. 712.

the qualifications of voters and admit the State again in the number of the Union.[106]

The first great question came regarding the President's power to recognize the existence of war and to be clothed thereby with the War Power as Commander in Chief and in that character to issue his blockading order[107] as Commander in Chief of the Navy, and thus acquire at once all the rights annexed to his office under international law.[108] There was no question as to his power to give belligerent rights to the South and to treat them and the Southern territory as if it were foreign ground. His proposition that the Union was both sovereign over the Seceded States and belligerent was not disputed but uniformly upheld.[109]

[106] *Texas v. White*, 7 Wallace 700.

[107] *Prize Cases*, 2 Black 635; *Dow v. Johnson*, 100 U. S. 158. The blockade proclamation was the beginning of the war. *The Protector*, 12 Wallace 700. The principle has been reaffirmed. *Matthews v. McStea*, 91 U. S. 7, and many cases.

[108] *Coleman v. Tennessee*, 97 U. S. 509; *Page v. U. S.*, 11 Wallace 268; *The Estrella*, 4 Wheat. 298.

[109] *The Prize Cases*, 2 Black 635; *Lamar v. Browne*, 92 U. S. 187. There was an old decision that in civil war belligerent rights might be added to those of sovereignty. *Rose v. Himely*, 4 Cranch 241. The Southerners, both during the war and afterwards, were constantly urging the legally untenable proposition that while the rebellious states as a confederation had all the rights and powers of a belligerent, the Nation fought with its hands tied, without the powers of a belligerent, but only with the powers given expressly by the Constitution as they interpreted it. This assumed fallacy makes the writings and speeches of the Rebels during the war and of the non-legal Southerners since the war such a dreary waste of legal nonsense. The manner in which the Davis government over-rode and flouted "States Rights," while appealing to Northern sympathizers with the South to uphold "States Rights" would be laughable, were it not so hypocritical.

All property in the belligerent South was enemy property.[110] The Courts held that he could rule in the theater of war with all the powers of military government and martial law, that he could rule regardless of constitutional provisions or guarantees, appoint war governors, institute courts, try offenders by military commissions, supersede all the usual civil offices and even ordain the terms upon which they could get back into the Union.[111]

There was no hesitation in the Supreme Court holding that the South was enemy territory and all property in that Territory was enemy property, to be dealt with as such. It was under this proposition of law that Lincoln issued as Commander in Chief the Emancipation Proclamation. It is a good instance of his constructive legal *formula* in operation. He had steadily labored to keep the Border States to the Union and he had done so. They would be alienated by the freeing of their slaves; there were, too, large parts of Louisiana and Virginia which were in the occupation of Union armies where the owners of slaves were not resisting the Union; those loyal Unionists in the Slave States who must be penalized or alienated,

[110] *Young v. U. S.*, 97 U. S. 39; *Hall v. Coppell*, 7 Wallace 542.

[111] *U. S. v. Diekelmann*, 92 U. S. 520; *Texas v. White*, 7 Wallace 700; *The Grapeshot*, 9 Wallace 129; *Burke v. Tregre*, 19 Wallace 519; *Mechanics Bank v. Union Bank*, 22 Wallace 276; *Scott v. Eaton*, 15 Wallace 382; this was the law before and it is still upheld. *Cross v. Harrison*, 16 How. 164; *Santiago v. Noqueras*, 214 U. S. 260. These cases show varying applications of the legal concept.

as hostiles, under the dictates of international law, he was compelled to treat in this respect, as belligerent enemies. The *formula* to suit these circumstances was without a flaw.

In the first place he did not attempt to change the law. He had repeatedly said that in peace Congress had no power to abolish slavery in a State and he stood by that declaration. All he did was to act upon enemy property in enemy territory as Commander in Chief under the War Power. He declared all slaves free in the States in Rebel occupation, but he excepted parts of Louisiana and Virginia in Union occupation and the slave owners therein.[112] He first intended to try to save the rights of Union men in enemy territory, but he concluded that to be legally impossible to reconcile with his *formula*. He did not touch the slave property in the Border States which had not seceded, thereby answering a double purpose, first, not to alienate the Border States, and, second, not to touch property that had never been in enemy territory. But he tried to induce those states to take money for their slaves and thus consent to emancipation. Chase, who was a States' Rights Democrat, objected to excepting parts of

[112] It is worthy of notice that John Quincy Adams many years before had prophesied that slavery could be abolished in the exercise of the War Power. No constitutional amendment was needed to free the slaves in all the conquered territory, but one was needed to free the slaves in the Border States as well as all other places in the Union that Lincoln's Proclamation of Emancipation did not reach.

States, insisting that a State must be dealt with as a unit, but Lincoln made an answer to him based on international law that was conclusive.

Under Lincoln's claim of his power to suspend the operation of the writ of Habeas Corpus a controversy at once arose with Chief Justice Taney. A man named Merryman was recruiting in Maryland for the Rebel service. He was arrested by the military, imprisoned in a fort, Taney as circuit justice issued a writ of Habeas Corpus and General Cadwallader sent an officer to inform the chief justice that the operation of his writ was suspended. Thereupon Taney issued an attachment as a *brutum fulmen* and then sat down and wrote an opinion[113] and sent it to the President and the President overruled him.

Taney made the point that by the English law only the legislative power could suspend the writ, but Horace Binney,[114] in a marvelously learned paper, conclusively proved that the executive power in England could suspend the operation of

[113] *Ex parte Merryman*, 17 Fed Cas. No. 9487. Taney did not seem to know what the question was. It was simply whether the President could arrest and detain. The vice of Taney's opinion is that he does not see the distinction between suspending the power of a court to issue the writ and suspending the operation of the writ in requiring the production of the body of the prisoner. Taney did not seem to know that the executive could arrest and hold a prisoner. Even a Governor of a State can do this. *Moyer v. Peabody*, 212 U. S. 78. This last case has left nothing of Taney's decision. Taney practically had held the same thing in *Luther v. Borden*, 7 Howard 1.

[114] Binney years before in the *Girard Will Case* had overthrown Webster by an unexampled command of the English cases.

the writ. Taney asserted that the clause in the Constitution for suspension is contained in a section referring to the legislative department, but this was untrue. That section contains certainly one clause against drawing money from the Treasury without an appropriation, which refers to the executive.[115] Finally he cited *dicta* of Marshall and Story, but Taney failed to see that those judges were referring to a legislative suspension of the power of a court to issue the writ, not to the executive power to suspend the operation of the unit. Lincoln was plainly right, since the suspension was in the very theater of the war and under the War Power.

Lincoln's theory of the War Power under the Constitution was a simple one. While a nation is fighting for its existence against an internal Rebellion, the Nation has all the War Powers given to a Nation by international law, and this power is not limited by anything else in the Constitution. He as President wielded as Commander in Chief the whole War Power, subject only to the power of Congress to decide upon the amount of army and naval forces, and to make appropriations therefor. Therefore the President could carry on the war in the theater of the war and the territory of military operations untrammeled by any of the

[115] *Reeside v. Walker*, 11 How. 272; *Collins' Case*, 15 Court of Claims 35; *Mitchell v. U. S.*, 18 Court of Claims 286.

guarantees and prohibitions in the Constitution, and this the Court as we have seen has supported. The validity of military commissions to try arrested offenders and martial law in the region of the war has not been disputed at any time.

It may be well here to anticipate the objection of *post hoc, propter hoc.* There is no written record where Lincoln set down in full his prospective course. But when the course is plain, and all the different acts concur and all look to the one theory, the proof is absolute. The fact that no politician of the period understood the *formula* is of no importance. The fact that no member of Lincoln's Cabinet understood what was being done is of no importance. Even after the war was over no member of the Cabinet understood the legal processes by which the result was accomplished, yet all agreed that in some way and by some means Lincoln had saved the Nation under the Constitution and the laws.

But finally I should notice the Milligan case. The existence of a state of war does not render the parts of a country not connected in some way with the theater of war subject to the military law except as to those in the military service. Military law applicable to the service exists both in peace and in war and is alone called the military law. Next there is military government applicable either in foreign war or civil war to all the territory

of the belligerent under control of the conquering power. This is the unlimited War Power proper. There is yet a kind of military law which applies in that part of the country adhering to the government or keeping to its allegiance and this is what is termed martial law. This has nothing to do with the suspension of the Habeas Corpus writ, but the declaration of martial law is often accompanied by the suspension of the operation of the writ. Martial law is under the control of the Commander in Chief, but no doubt Congress can legislate upon the subject. Congress had passed a law regarding military arrests during the progress of the war.

This brings us to the question involved in the Milligan case. It is a question of martial law pure and simple. The State of Indiana was in the Civil War a military district. Its legislature was disloyal and refused in 1863 to make appropriations to put any of its soldiers in the Federal army. It had probably the largest percentage of copperheads, persons desiring to assist the Rebellion, of any Western State. A man named Milligan, a citizen and resident of Indiana, had been guilty of numerous grossly disloyal acts. The operation of the writ of Habeas Corpus in that District had been suspended. Milligan was arrested by the military commander in that district, held in jail, brought for trial before a Military Commission and condemned to death. After Lincoln's assassination

President Johnson, who was then ramping and roaring about death to all traitors, and trying to hang Jefferson Davis, confirmed the sentence of the Court as Commander in Chief and the question was whether the sentence was lawful.

It was plain under the law that Milligan was entitled to be discharged under the Act of Congress then in force, and that he had not therefore been lawfully tried by the Military Commission. It was not necessary to go further and decide upon the proper limits of martial law, but Justice Davis, writing the opinion of the Court, went further and attempted to define its limits. There was no question made and the court conceded that martial law was proper and military commissions were proper in all the conquered territory of the South and in all the districts contiguous to and in the theater of war. There was no question as to the suspension of the writ of Habeas Corpus. The sole point made by Justice Davis was whether in the State of Indiana, never in rebellion, not occupied nor closely adjacent to military operations, and where all the civil courts were functioning, trials could be had before military commissions. Justice Davis decided that a trial could not be had before a military commission in such circumstances and he decided that martial law could not be declared in Indiana. Five judges united in the opinion, and four judges dissented on this last

proposition of Davis. The dissenters, Chase, Miller, Swayne, and that stout old Unionist Wayne of Georgia, united in an opinion written by Chief Justice Chase denying the dictum of Justice Davis.

The rule laid down by Justice Davis cannot be considered sound.[116] The authorities he cites are all English and they have no validity in this country. There the law was in such a condition that if a mutiny took place in the army the commander must call in the sheriff. The same rule must apply to a civil war as to a foreign war. Suppose now in case of a foreign war a large part of the population in a certain district of the United States sympathized with the enemy and was doing all it could to help the enemy, even enlisting men to fight for the enemy, and obstructing the government in every possible way, as was the case in Indiana, martial law would be instituted and enforced and arrests made and trials had before military commissions, and the Court would uphold them.

But the Milligan case does not affect Lincoln. He had been assassinated and faction could

[116] The actual decision of Judge Davis, 4 Wallace 2, cannot be reconciled with the case of *Luther v. Borden*, 7 Howard 1, where Taney wrote the opinion. In the dissenting opinion of Woodbury in this last case the English authorities are cited at profuse length. It has been supposed by some that the Milligan case would show that the Military Court that tried those charged with Lincoln's assassination was unlawful. But this is not tenable, for Washington was in the very theater of the war and subject to the jurisdiction of military commissions or courts instituted by the President. The test of the courts regularly functioning was disapproved in *Moyer v. Peabody*, 212 U. S. 78.

trouble him no more. The sentence of the military court imposed on Milligan was death and the only way to save Milligan's life was for the Court to save it. Lincoln would not have approved the sentence but in his merciful way would have said that Milligan's execution would do no good, and he would have told Milligan to go in peace and bring forth fruits meet for repentance. So far as the administration of martial law was concerned, it was always mildly and mercifully applied by Lincoln.[117]

[117]The facts are in Randall's book. Lincoln's conduct was in sharp contrast to the savage cruelties practiced by the Davis government upon loyal people in the Southern States. When I was young, Trowbridge's *Cudjo's Cave* gave an insight into that situation. But the undoubted fact is that as early as 1861, the Rebel soldiers began to desert and as bands of guerrillas ravaged the country, robbing and plundering even the most ardent Secessionists. The methods of the Davis government in plundering by all sorts of agents are well known. The Rebels pillaged the non-seceding territory whenever they had a chance. On Sherman's March to the Sea much of the devastation was done by retiring Rebels. See for the orders to devastate, Seitz, *Braxton Bragg*, p. 470, and the orders were carried out. Bragg reported: "The country is being (by us) utterly devastated wherever the enemy moves." In the latter part of the war the soldiers of the Rebellion practiced hideous cruelties on the Southerners which Bragg was powerless to prevent. See the later pages of Seitz. These wretches no doubt figured as Union troops. North Carolina tried to get out of the Confederacy, but President Davis ordered the arrest of the Peace Commissioners. The Southerners enrolled in their armies many negroes. The horrors of the treatment of the negroes enrolled in the Southern army are also in the Life of Bragg, and if imitation is the sincerest flattery, the Southern emancipation of slaves justifies Lincoln in feeling flattered by the Southern imitation. It gives the lie to all the Southern rodomontade about a servile insurrection just as the conduct of the negro soldiers in the Union army was above reproach. The savage treatment by the Davis government of negro soldiers was essentially barbarous. Bragg acknowledged the facts, as Seitz shows. Since this note was written the work, *The Reward of Patriotism*, has furnished full information and indubitable references to the Official Records on the above points.

VIII

CONCLUSION

LADIES and Gentlemen, I have finished what I set out to accomplish. I have demonstrated that Abraham Lincoln is entitled to his highest praise *as a lawyer*. I have shown you, I hope, that the largest part of his wisdom and success was due to his legal training and his extraordinary ability as a lawyer. It has been with me a labor of love to set before you this day the proof that the science of jurisprudence to which I have given my life, a science which embodies the vast inherited experience of mankind, a science which, the greatest of publicists has said, has done more for the progress of the human race than all other sciences put together, could so inform and liberalize and discipline this great spirit touched to fine issues, that he could guide his country through her darkest years to the heights of unity and peace. Lincoln's fame has been constantly growing since his death, but his legal ability, his supreme possession, has been uniformly belittled or ignored. The memorial to Lincoln which looks over the Potomac, in its severe Greek proportion is peculiarly worthy of that trait of the President, but the Legal Lincoln is not there. Yet it is certain that

when the muse of legal history calls the roll of the eminent lawyers in our country's story, and records the greatest of those worthies, she will write Hamilton, with his acute, constructive intellect, as the brilliant, consummate flower of our earlier constitutional history, will write Marshall and Webster as the ripe fruits of the noonday of our growing love and reverence for the Nation, then, dipping her pen in the sunlight, will write with those deathless names, ABRAHAM LINCOLN, the patriot, statesman, martyr and lawyer, who saved this Union to live on for the happiness of mankind.[118]

Blest and thrice blest is this City, that cherishes his honored memory. Blest and thrice blest is this Association, which meets upon his natal day to lay a wreath of loving remembrance upon his reverend tomb. We may think with sadness that now and then a man still lives to traduce this great, kindly, merciful soul, but the judgment of the world is fixed and his noble and venerated name[119] shall have renown forevermore.

It is enough to say that when full gratitude has been rendered to those who have done great things, then and only then will one, who has paid

[118] In the above sentence the frame of the idea is from the *Toussaint l'Ouverture* of Wendell Phillips. There is a peculiar propriety in appropriating some of Phillips' eloquence to the service of Lincoln, for during the period of the war no one exceeded Phillips in savage abuse of the President.

[119] *Clarum et venerabile nomen*—Lucan.

his debt, be entitled to mark down and dwell upon any shortcomings of such men for either the profit or the pleasure of inferior men or of ourselves.

Time with unerring judgment selects and carefully preserves its immortal treasures of human life and achievement and gives them a luster which shall ever be undimmed.

> "To things immortal time can do no wrong,
> And that which never is to die, for ever must be young."[120]

[120] Cowley. To those who may deem that too many quotations have been used in this paper, I can only reply with Montaigne's saying that next to the ability to utter a fine thought is the willingness to quote one. Emerson put the same idea in different words.

Of this book,

designed by WILLIAM A. KITTREDGE,

three hundred copies have been printed from type for

THE CAXTON CLUB

by R. R. DONNELLEY & SONS COMPANY

at THE LAKESIDE PRESS, *Chicago,*

in the month of June, 1932.